CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 40

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1935
CERTIORARI GRANTED JUNE 3, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 40

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Fifth Circuit	A	
Captions [omitted in printing]	A	1
Record from D. C. U. S., Northern Alabama	2	1
Information for violation of section 206, title 26, U. S. C. A. and order thereon	2	1
Demurrers and order thereon	5	2
Exhibit A'—Letter of collector of internal revenue	11	5
Motion to strike and order thereon	13	6
Waiver of jury	14	7
Defendant's plea of not guilty	14	7
Stipulation of facts	15	7
Exhibit A—Letter of collector of internal revenue	18	9
Exhibit B—Excerpt from Treasury Department Regulation 3911	20	10
Exhibit C—Notice to collectors	21	11
Finding of facts and conclusions of law presented by defendant and order of court thereon	22	11
Finding of facts and conclusions of law	27	14
Motion to find the defendant guilty	28	14
Motion to find the defendant not guilty	29	15
Judgment and sentence	30	15
Bill of exceptions	33	17
Order of court approving bill of exceptions	36	18
Assignments of error	37	19
Notice of appeal	40	20
Appeal bond [omitted in printing]	42	21
Stipulation as to transcript of record	44	21
Clerk's certificate [omitted in printing]	46	22
Argument and submission [omitted in printing]	47	22
Opinion, Hutcheson, J	48	22
Judgment	54	25
Petition for rehearing	55	26
Order denying rehearing	58	27
Clerk's certificate [omitted in printing]	59	27
Order allowing certiorari	60	27

A [Captions omitted.]

2 In United States District Court for the Southern Division of the Northern District of Alabama

September term, 1934

Information for violation of section 206, title 26, U. S. C. A. (sec. 701 of the Revenue Act of 1926)

THE UNITED STATES OF AMERICA,
SOUTHERN DIVISION OF THE
NORTHERN DIVISION OF ALABAMA, *ss*:

First count: Violation of section 206, title 26, U. S. C. A. (section 701 of the Revenue Act of 1926).

Jim C. Smith, attorney of the United States for the Northern District of Alabama, who in this behalf prosecutes in the name of the United States, and for the United States, comes here into said court on this 21st day of November 1934, in his own proper person, and for the United States gives the said court here to understand and be informed that, as shown by the affidavit and complaint hereto annexed, one Gus L. Constantine, alias Dr. Gus, whose name is otherwise unknown to said attorney, heretofore, to wit, on
3 or about the 8th day of October 1934, at or near Birmingham, in the county of Jefferson, State of Alabama, in the division and district aforesaid, and within the jurisdiction of this court, did then and there unlawfully carry on the business of a retail dealer in malt liquor, without first having paid the special excise tax of $1,000 as required by section 701 of the Revenue Act of 1926, and section 206, title 26, U. S. C. A.; that at the time and place aforesaid, the laws of the State of Alabama prohibited the carrying on of the business of a retail dealer in malt liquor, and the carrying on of such business was contrary to the laws of the State of Alabama; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Whereupon, said attorney of the United States, who prosecutes as aforesaid for the United States, prays the consideration of the court here in the premises, and that due process of law may be awarded against the defendant, in this behalf to make his answer to said United States concerning the premises aforesaid.

JIM C. SMITH,
United States Attorney.

4 *Order*

Upon consideration of the above and foregoing and for good cause shown, it is ordered by the court that:

Leave to file this information is granted, and upon motion of the United States attorney, it is ordered that:

A capias for the arrest of the defendant be issued as prayed for.

This the 21st day of November 1934.

W. I. GRUBB,
United States District Judge.

[*Duly sworn to by James T. Rogers; jurat omitted in printing.*]

5 IN UNITED STATES DISTRICT COURT

No. 8767

UNITED STATES OF AMERICA

v.

GUS L. CONSTANTINE

Demurrers

Filed December 3, 1934

Now comes the defendant in the above cause and demurs to the information heretofore filed herein, the basis of this proceeding, and to each count thereof, separately and severally, assigning the following separate and several grounds of demurrer as to each, that is is to say:

1. For that section 206, title 26, U. S. C. A., violates the Constitution of the United States, and is accordingly invalid.

2. For that said section violates the provisions of article I, section 8, of the Constitution of the United States in that the levy therein provided for is not uniform throughout the United States.

3. For that said section violates the provisions of the tenth
6 amendment to the Constitution of the United States, in that it seeks to exercise powers reserved to the several States.

4. For that the Federal Government has no plenary or police power whatsoever over subject matter of beer, the so-called "tax" imposed by said section being a penalty to coerce the people in dry States to act as Congress wishes them to act in respect to a matter completely the business of the several State governments.

5. For that prior to the adoption of the eighteenth amendment of the Constitution of the United States, and since the repeal of said amendment which became effective December 5, 1933, neither the Federal Government nor Congress has any power with respect to the manufacturer or sale of alcoholic beverages, except the power of taxation, and the Federal Government has had no so-called "police

power" over said subject matter since the repeal of said amendment.

6. The levy set up by said section is a penalty and not a tax.

7. The Federal Government is without right to imprison one of its citizens for failure to pay to it a penalty.

8. In this action the United States seeks to imprison one of its subjects for debt for violation of the Bill of Rights, part of the Constitution of the United States.

9. The Supreme Court of the United States has specifically
7 held in the case of United States v. LeFrance, (51 Supp. Ct. 278; U. S. 568), that the so-called "tax" imposed by said section is in truth and in fact a penalty, in the nature of punishment for an act criminal in nature and is not a tax.

10. For that the levy imposed by said section is but an abortive attempt on the part of the Federal Government to intermeddle with the internal affairs of the several States.

11. For that said section seeks to levy a penalty upon a penalty.

12. For that from aught that appears from said information the defendant herein has paid to the United States within the period mentioned in the information all of the taxes provided by sections 202 to 205, both inclusive, title 26, U. S. C. A.

13. For that during the period complained of in said information the defendant had acted in good faith on the written information given him by the United States through the collector of internal revenue for the district of Alabama in the attached circular letter, marked "Exhibit A", and by reference made part hereof as fully as though the same were set forth herein in detail, and had paid to the United States all of the taxes as therein provided.

14. For that said information fails to show that the collector of internal revenue had in his possession a stamp covering the levy set up by said section which he could have delivered over to the defendant had the defendant tendered to him the $1,000.00 therein provided to be paid as an alleged "excise tax."

8 15. For that said section seeks to delegate to the several States the power to impose and fix the amount of excise taxes to be paid to the United States.

16. For that said section is dependent for its effectiveness upon the acts of the legislatures of the several States.

17. For that the said alleged excise tax is to be levied only at the pleasure of the people of the several States speaking through their respective State legislatures.

18. For that the facts set forth in said information and/or complaint fail to charge this defendant with any crime punishable by fine and/or imprisonment under any valid statute of the United States.

19. For that no sufficient facts are set forth in the said information and/or complaint to authorize the arrest of the defendant herein.

20. The levy set up by said section has been repealed by subsequent acts of the Congress of the United States.

21. For that it is not shown that the malt liquor sold contained more than 3.2% alcohol by volume.

22. For that the said levy has been repealed, if not in express words, by implication by the provisions of the act of Congress approved March 22, 1933, codified as section 506–C, title 26, U. S. C. A.

23. For that the said levy was repealed and/or rendered inoperative by the adoption of the twenty-first amendment to the Constitution of the United States.

9 24. For that it is not shown that the malt liquor sold contained more than one-half of one per cent alcohol by volume.

25. For that the court judicially knows that at the time and place alleged in said incorporation the laws of the State of Alabama did not prohibit the carrying on of the business of a retail dealer in malt liquor containing not more than one-half of one per cent, and it is not alleged that defendant sold or offered for sale malt liquor containing more than one-half of one per cent alcohol.

26. For that it is not averred or alleged that the defendant did unlawfully carry on the business of a retail dealer in malt liquor containing more than one-half of one per cent alcohol.

27. For that the court judicially knows that at the time and place alleged in said information the laws of the State of Alabama did not prohibit the carrying on of the business of a retail dealer in malt liquor, but merely regulated the amount of alcohol to be contained in such malt liquor.

28. For that said section is unconstitutional and void in that by its terms Congress seeks to delegate its legislative powers to the several States, Territories, or districts and even to the municipalities and localities therein.

29. For that said section 206, title 26, U. S. C. A., imposes a penalty which was repealed with the repeal of the eighteenth amendment.

30. For that said section is an unwarranted delegation by Congress of its legislative powers.

10 31. For that said section imposes an excise tax that is not uniform throughout the United States.

32. For that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, soon after said section 206, title 26, U. S. C. A., became effective, published Treasury Department Regulation 3911 in which it was specifically held that said levy was a penalty and not a tax. Said regulation was effective as of the various days and dates mentioned in the information hereinbefore referred to, the basis of this proceeding.

33. For that the said code section in its present form was first adopted February 26, 1926, and became effective on and after July 1, 1926. On July 30, 1926, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury of the United States, under power in him vested by Federal Statute, issue a Treasury Department regulation, amplifying the said section, de-

fining its intent and purpose, and providing for its enforcement, denominated as Treasury Department Regulation 3911; in this regulation the levy here in question was declared to be a penalty and not a tax. Said regulation remained in force and effect until about October 1, 1934, when the Commissioner of Internal Revenue issued instructions to the collector of internal revenue for the District of Alabama that said levy was a true tax and not a penalty.

34. For that said section is in violation of the fifth amend-
11 ment to the Constitution of the United States in that it seeks to deprive citizens of the United States of their property without due process of law.

WILLIAM S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

Order of court

Demurrers, overruled and disallowed, defendant excepts, this December 3rd, 1934.

W. I. GRUBB,
U. S. District Judge.

Exhibit A to demurrer

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Birmingham, Ala.

Official seal and stamp.

Office of the collector, District of Alabama.

In replying refer to all beer and liquor dealers.

There is enclosed herewith form 11, on which you are privileged to make application for special tax stamp as a dealer in alcoholic beverages.

The Government's fiscal year ends on June 30, 1934, and all current stamps expire on that date. If alcoholic beverages are sold during the month of July and no stamp has been purchased allowing such sales, on or before July 30, the dealer automatically be-
12 comes delinquent and will be subject to an ad valorem penalty of 25%, in addition to specific penalties provided for in the United States Statutes.

The rates for the fiscal year beginning July 1, 1934, and ending June 30, 1935, are as follows:

Retail liquor dealer	$25.00
Retail malt liquor dealer (beer)	20.00
Wholesale liquor dealer	100.00
Wholesale malt liquor dealer	50.00

Retail dealers are those who deal in quantities of less than five gallons. Wholesale dealers are those who deal in quantities of more than five gallons, except that one possessing a stamp as a wholesale

dealer is not permitted to deal in quantities of less than five gallons, and retail dealers are not permitted to deal in quantities of more than five gallons.

It will be noticed that on the enclosed application form 11, applicants are required to give a specific address as to the location of their business. If a stamp is issued by the office of the collector of internal revenue at a specific address, the stamp so issued is only good when used at the given address, unless the address is changed at the office of the collector of internal revenue from which it was issued.

In making application for special tax stamp, please remit with cash, money order or certified check, inasmuch as personal checks are not valid unless certified by your banker. Applications must be sworn to in the presence of a notary public or other eligible officer.

Any inquiries concerning beer or liquor dealers' stamps should be directed to the collector of internal revenue, miscellaneous tax division, Birmingham, Alabama.

HARWELL G. DAVIS,
Collector.
By HUGH W. CARDON,
Acting Chief, Miscellaneous Tax Division.

HWC:EB

13 In United States District Court

Motion to strike

Filed December 3, 1934

Now comes the defendant in the above cause and moves to quash and/or strike the information heretofore filed herein by Jim C. Smith, United States attorney, and the order made and entered thereon by the Honorable W. I. Grubb, United States district judge, and as grounds for said motion, assigns separately and severally the following:

The defendant assigns separately and severally in support of this motion each and every ground of demurrer heretofore set up and assigned to the said information, the basis of this proceeding.

W. S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

Order of court

Motion disallowed, and denied, defendant excepts, this December 3rd, 1934.

W. I. GRUBB,
U. S. District Judge.

14 In United States District Court

Waiver of jury

Filed December 3, 1934

Trial by jury is hereby waived by the defendant. This the 3rd day of December 1934.

WILLIAM S. PRITCHARD,
Attorney for Defendant.

Consented to by

JIM C. SMITH,
United States Attorney.

In United States District Court

Defendant's plea of not guilty

Filed in open court December 3, 1934

Comes now the defendant in the above-styled and numbered cause and for answer to the information heretofore filed therein, pleads not guilty; this the 3rd day of December 1934.

WILLIAM S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

15 In United States District Court

Stipulation of facts

Filed December 3, 1934

Subject to legal objections it is agreed by and between the parties hereto that the defendant for the period of time from July 1st, 1933, to June 30th, 1934, was a retail dealer in malt liquors in the city of Birmingham, Jefferson County, Alabama, and that he paid to the collector of internal revenue the sum of twenty dollars ($20.00) in payment of tax stamps as required by paragraph (c) of section 205, title 26, U. S. C. A.; that for the period of time from July 1st, 1934, to June 30, 1935, the defendant registered with the collector of internal revenue as a retail liquor dealer and paid to such collector the sum of twenty-five dollars ($25.00) as required by paragraph (a) of section 205, title 26, U. S. C. A.; and that at the time stated in the information in this case, the defendant was a retail dealer in malt liquors containing more than one-half of one percent alcohol, and that in connection with the operation of his restaurant in the city of Birmingham, and at the time stated in the information in this case, he daily retailed malt liquors

containing more than one-half of one percent alcohol; that at the time stated in such information, it was contrary to the laws of the city of Birmingham, in which city the defendant operated his
16 said restaurant and in connection therewith sold at retail malt liquors, for a person to engage in the business of and be a retail dealer in malt liquors containing more than one-half of one percent alcohol, and was likewise contrary to the laws of the State of Alabama for the defendant to carry on the business of a retail dealer in malt liquors containing more than one-half of one percent alcohol; that the conduct of the defendant in being such retail malt-liquor dealer was a violation of the laws of the State of Alabama and also the laws of the city of Birmingham, Alabama, in which city he engaged in such business; that the defendant had not at any time paid the one thousand ($1,000.00) dollars prescribed in section 206, title 26, U. S. C. A., and that he was carrying on the business alleged in the information without having first paid such $1,000.00.

That defendant received from the collector of internal revenue shortly prior to the beginning of each fiscal year herein mentioned a circular substantially similar to the circular attached hereto, marked "Exhibit A", and by reference made a part hereof. Harwell G. Davis, collector of internal revenue for the district of Alabama, did not have in his possession or under his control the $1,000 liquor stamp until the 27th day of November 1934. No such stamps were shown to be in existence in any catalogue of stamps issued by the United States prior to the 13th day of September 1934. At the time when defendant purchased each of the stamps herein
17 mentioned, defendant testifies he was told by the agent of the collector of internal revenue to whom payment was made, that the tax shown in the attached circular, exhibit A hereto, was the only tax or license he was required by the United States to pay for the privilege of dealing at retail in said malt liquors in the said city of Birmingham, and this the collector and agent deny, defendant received from the collector's office the attached letter addressed to all beer and legal dealers.

The said code section in its present form was first adopted February 26, 1926, and became effective on and after July 1, 1926. On July 30, 1926, the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury of the United States, under power in him vested by Federal statute, issued a Treasury Department regulation, amplifying the said section, defining its intent and purpose and providing for its enforcement, denominated as Treasury Department Regulation 3911. Copy of excerpt of said regulation is attached hereto, marked "Exhibit B", and by reference made part hereof as fully as though the same were set forth herein in detail. Said regulation remained in force and effect until on or about the 13th day of September 1934, at which time the Commissioner of Internal Revenue issued new instructions to the collector of internal

revenue for the district of Alabama, advising him that said levy was a true tax and not a penalty, copy of excerpt from which is hereto attached, marked "Exhibit C."

18 No demand was ever made by the collector of internal revenue for the district of Alabama upon this defendant, for the payment of the said $1,000 levy until about October 1st, 1934.

This the 3rd day of December 1934.

JIM C. SMITH,
United States Attorney.

WILLIAM S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

Exhibit A to stipulation of facts

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Birmingham, Ala.

Official seal and stamp.
Office of the collector, district of Alabama.
In replying refer to—

To all beer and liquor dealers.

There is enclosed herewith form 11, on which you are privileged to make application for special tax stamp as a dealer in alcoholic beverages.

The Government's fiscal year ends on June 30, 1934, and all current stamps expire on that date. If alcoholic beverages are sold during the month of July and no stamp has been purchased allowing such sales, on or before July 30, the dealer automatically becomes

19 delinquent and will be subject to an ad valorem penalty of 25%, in addition to specific penalties provided for in the United States statutes.

The rates for the fiscal year beginning July 1, 1934, and ending June 30, 1935, are as follows:

Retail liquor dealer	$25.00
Retail malt liquor dealer (beer)	20.00
Wholesale liquor dealer	100.00
Wholesale malt liquor dealer	50.00

Retail dealers are those who deal in quantities of less than five gallons. Wholesale dealers are those who deal in quantities of more than five gallons, except that one possessing a stamp as a wholesale dealer is not permitted to deal in quantities of less than five gallons, and retail dealers are not permitted to deal in quantities of more than five gallons.

It will be noticed that on the enclosed application Form 11, applicants are required to give a specific address as to the location of their business. If a stamp is issued by the office of the collector of internal revenue at a specific address, the stamp so issued is only good when used at the given address, unless the address is changed at the

office of the collector of internal revenue from which it was issued.

In making application for special tax stamp, please remit with cash, money order, or certified check, inasmuch as personal checks are not valid unless certified by your banker. Applications must be sworn to in the presence of a notary public or other eligible officer.

Any inquiries concerning beer or liquor dealers' stamps should be directed to the collector of internal revenue, miscellaneous tax division, Birmingham, Alabama.

HARWELL G. DAVIS,
Collector.

By HUGH W. CARDON,
Acting Chief, Miscellaneous Tax Division.

HWC:EB

20 *Exhibit B to stipulation of facts*

Excerpt and summary from Treasury Department Regulation 3911, approved by the Secretary of the Treasury, and published as of July 30, 1926, as the same relates to section 701, of the revenue act of 1926; section 206, title 26, U. S. C. A.

(T. D. 3911)

Treasury Department officers and Commissioner of the Internal Revenue, Washington, D. C.

Prohibition—Assessment of taxes.

To: Prohibition administrators, collectors of internal revenue, and others concerned:

Subject of internal revenue and prohibition taxes are divided into two classes:

1. Internal revenue taxes proper; that is, taxes generally recognized as such.

2. Those while in the nature of internal revenue taxes are necessarily held to be penalties, "and must be collected through the United States courts."

The following is list classed as taxes:

Retail dealers in malt liquors	$20.00
Wholesale dealers in malt liquors	50.00

The following is list classed as penalties:

"Under section 701 of the revenue act of 1926. A special tax of $1,000 on any person carrying on retail business of dealer in malt liquors contrary to laws of State or Territory."

21 "All outstanding proposals of assessments of this class will be immediately withdrawn by collectors and forwarded to the United States attorney through the administration in whose administrative district their collection district lies."

All liens on the property of taxpayers against whom assessments have been made of this class of cases should be released.

"Those designated as penalties, such taxes will be carefully scheduled, summarized, and reported to the United States attorney for any action he may bring."

(Signed) D. H. BLAIR,
Commissioner of Internal Revenue.

Approved July 30, 1926.

(Signed) G. B. WILSON,
Acting Secretary of the Treasury.

Exhibit C to stipulation of facts

Prior to the receipt of the $1,000 special excise tax stamps, collectors of internal revenue may accept payment of the tax and issue the stamps at a later date. While section 3183 of the Revised Statutes prohibits the issuance of a receipt in lieu of a stamp, Treasury Decision No. 2341 holds in effect that a taxpayer is entitled to some evidence of payment when he presents a remittance to an internal-revenue officer in satisfaction of a special tax and it is not possible to issue the special tax stamp immediately. It will, therefore, be permissible for collectors to issue receipts on form 1, which receipts will be construed as merely evidence of payment and will not be in lieu of the $1,000 special excise tax stamp.

22 In United States District Court

Findings of fact and conclusions of law presented by defendant and order of court thereon

Filed in open court December 3, 1934

From the evidence offered on the trial of this cause the court specially finds the facts herein to be:

I

Gus L. Constantine, the defendant herein, for the period of time from July 1, 1933, to June 30, 1934, operated a restaurant in the city of Birmingham, in connection with which he daily sold malt liquors (beer) at retail in the city of Birmingham, Jefferson County, Alabama. Throughout said period he was a retail dealer in malt liquors in said city. Prior to July 1st, 1933, he paid the tax, and secured stamps as provided by the provisions of section 205, (c) title 26 U. S. C. A.

II

Within the time as provided by paragraph (c), section 205, title 26, U. S. C. A. defendant paid to the collector of internal revenue for the district of Alabama, all of the tax as therein provided and secured the requisite stamps. On or about July 1, 1934, de-

23 fendant registered with the said collector of internal revenue as a retail liquor dealer, and paid to such collector the sum of $25.00 as required by paragraph (a), section 205, title 26, U. S. C. A., being the tax therein required, for the period July 1, 1934, to June 30, 1935.

III

At the time stated in the information, the basis of this proceeding, it was contrary to the laws of the city of Birmingham, and contrary to the laws of the State of Alabama, in which city and State the defendant operated his restaurant and sold at retail malt liquors, for a person to engage in and be a retail dealer in malt liquors.

IV

The defendant herein at no time paid the $1,000 prescribed in section 206, title 26, U. S. C. A. He carried on the business alleged in the information, in violation of the laws of the said city of Birmingham and State of Alabama without having paid the said $1,000 as prescribed in said section.

V

The defendant received from the collector of internal revenue for the district of Alabama, shortly prior to the beginning of each
24 of the fiscal years herein mentioned, a circular, exhibit A, to the stipulated facts filed herein, providing among other things:

"The rates for the fiscal year beginning July 1, 1934, and ending June 30, 1935, are as follows:

Retail liquor dealer	$25.00
Retail malt liquor dealer (beer)	20.00
Wholesale liquor dealer	100.00
Wholesale mart liquor dealer	50.00"

VI

The said collector of internal revenue did not have in his possession or under his control the $1,000 liquor stamp provided for in said section 206, title 26, U. S. C. A., until November 27, 1934. No such stamp was shown to be in existence in any catalogue of stamps issued by the United States prior to September 13, 1934. No demand was ever made by the collector of internal revenue for the district of Alabama, or any other person, for the payment of the $1,000 levy until about October 1, 1934.

VII

Said section 206, title 26, U. S. C. A., was adopted February 26, 1926, and became effective on and after July 1, 1926. On July 30, 1926, the Commissioner of Internal Revenue with the approval of

the Secretary of the Treasury published Treasury Department
25 Regulation numbered 3911. The pertinent parts of this regulation are set forth as exhibit B in the stipulated facts filed herein. In this regulation the levy set up under the provisions of section 205, title 26, U. S. C. A., was declared to be a tax. The levy set up under the provisions of section 206 of said title 26, U. S. C. A., was declared to be a penalty. This regulation contained instructions to the officers of the Bureau of Internal Revenue to so treat and construe the said two sections in the matter of their enforcement. This regulation remained in force and effect until on or about September 13, 1934, at which time the Commissioner of Internal Revenue issued new instructions, set out as exhibit C in the stipulated facts, and in which instructions the collector of internal revenue for the district of Alabama was specifically instructed to treat the levy made by said section 206 as a tax and not a penalty, and directing him to proceed to collect the same as a tax. No demand was made upon the defendant herein by any officer of the Bureau of Internal Revenue for payment of the $1,000 levy until on or about October 1, 1934.

CONCLUSIONS OF LAW

A. The court finds as a conclusion of law from the facts found, that the defendant is not guilty and should be discharged.

B. The court finds as a conclusion of law from the facts
26 found, that section 206, title 26, U. S. C. A., is invalid. That the levy therein set up is a penalty and not a tax. That defendant is accordingly not guilty and should be acquitted.

Given at Birmingham, Alabama, this the 3rd day of December 1934.

_____,
United States Judge.

Order of court denying defendant's findings of facts

The court found the facts stated in the findings of facts presented by the defendant above set out to be true but being of the opinion that all the facts except those stated in the first paragraph of the stipulation to be irrelevant, excluded the same from its consideration, to which action of the court, the defendant then and there duly excepted.

Given this 3rd day of December 1934.

W. I. GRUBB,
District Judge.

27 In United States District Court

Findings of facts and conclusions of law

Filed in open court December 3, 1934

From the evidence stipulated in and offered on the trial of this case the court finds specially the facts here to be:

I

The court finds the pertinent and legal facts herein to be as contained in paragraph one of the stipulation of facts filed herein, which paragraph begins "It is agreed by and between the parties hereto" and ends with the words, "without having first paid such $1,000.00."

II

The court further finds that the facts as stipulated between the parties and as contained in the remaining paragraphs of said written stipulation of facts are true, as in such paragraphs stipulated, but, upon objections interposed thereto by the United States Attorney, the court excludes such facts except the statutes and stipulations which are judicially known as being irrelevant and
28 illegal to any of the issues involved in this case, to which ruling of the court defendant duly excepts, and such exception is duly allowed.

CONCLUSIONS OF LAW

The court found as a conclusion of law from the facts found that the defendant had violated section 206. That the said section provided for a tax and not a penalty and that the tax so provided, was a valid tax. To which action of the court defendant duly excepts; exception allowed.

Given at Birmingham, Alabama, this the 3rd day of December
" 1934; defendant excepts; exception allowed.

W. I. GRUBB,
United States District Judge.

In United States District Court

Motion to find the defendant guilty

Filed December 3, 1934

Now comes the United States of America in the above-entitled cause and moves the court to render a judgment herein finding the defendant guilty as charged in the information heretofore
29 filed in said cause, and as grounds therefor, assigns, separately and severally, the following grounds:

1. That upon the facts as contained in paragraph no. 1 of the stipulation of facts filed in this cause, the defendant is clearly guilty of the offense charged against him in the information.

JIM C. SMITH,
United States Attorney.

Motion granted this 3rd day of December, 1934, defendant excepts.

W. I. GRUBB,
United States District Judge.

In United States District Court

Motion to find defendant not guilty

Filed in open court December 3, 1934

Now comes the defendant in the above-styled cause, who has heretofore in writing waived trial by jury, and moves the court that he the said defendant be found not guilty upon the information heretofore filed in said cause; and as grounds therefor assigns, separately and severally each of the following separate and several grounds:

1. Upon each of the separate and several grounds assigned heretofore by the said defendant in his demurrers to the said information heretofore filed in this cause.

2. Upon each of the separate and several grounds assigned heretofore by the said defendant in his motion to quash the said information heretofore filed in this cause.

3. For that the law applicable thereto and the facts stipulated to be true in this cause establish the innocence of this defendant.

4. For that the facts stipulated to be true in this cause, and the law applicable thereto, establish that this defendant is not guilty of the crime charged.

W. S. PRITCHARD,
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Defendant.

ORDER OF COURT

Motion overruled, defendant excepts, this December 3rd, 1934.

W. I. GRUBB,
District Judge.

In United States District Court

Judgment and sentence

Monday, December 3rd, 1934

This District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to ad-

journment; present, Honorable W. I. Grubb, United States
31 District Judge, Northern District of Alabama, presiding; Honorable Jim C. Smith, United States attorney; Thos. J. Kennamer, United States marshal; and W. S. Lovell, clerk.

UNITED STATES OF AMERICA

vs.

GUS CONSTANTINE, ALIAS DR. GUS

This case having been called for trial upon a criminal information heretofore filed by the United States attorney, Mr. Jim C. Smith, United States attorney, appeared for the Government and Hill, Hill, Whiting, Thomas & Rives appeared for the defendant, the defendant also appearing in person.

Thereupon, the defendant files and interposes a demurrer to the information and said demurrer being duly considered and the premises understood by the court, it is:

Ordered, adjudged, and decreed by the court that said demurrer be and the same hereby is overruled, to which action of the court the defendant duly reserves an exception, which is allowed.

Thereupon, the defendant files and interposes a motion to quash the information and the same being considered and understood by the court, it is:

Ordered, adjudged, and decreed by the court that said motion be, and the same hereby is denied, to which action an exception is duly reserved to the defendant, which is allowed.

32 And thereupon, the defendant appearing in person and being arraigned upon said information, entered a plea of not guilty thereto. And thereupon, the defendant filed a written waiver of his right to a trial by jury in this cause, which is assented to by the United States attorney, and the trial of this cause is begun. The parties hereto having stipulated and agreed upon the facts, subject to legal objections thereto, and after a consideration of the evidence and the law, the court finds the facts in accordance with written stipulation this day filed, and is of the opinion and so finds from the evidence legally admissible, that the defendant is guilty as charged in the information filed against him.

And thereupon, the defendant, being inquired of and showing no good or sufficient excuse why judgment should not now be pronounced upon him, it is:

Considered, ordered, and adjudged by the court that for the offense charged against him, the defendant, Gus L. Constantine, alias "Dr. Gus", be and he hereby is sentenced to pay a fine of two hundred and fifty dollars ($250.00) and that he remain imprisoned in

the common jail of Jefferson County, Alabama, until said fine is paid, or until he is otherwise discharged by law.

Done in open court this 3rd day of December, A. D., 1934.

W. I. GRUBB,
United States District Judge.

33 In United States District Court

Bill of exceptions

Filed December 26, 1934

Be it remembered that heretofore and on, to wit, the 3rd day of December, 1934, at a stated term of said court begun and holden in Birmingham in and for the Northern District of Alabama, before his honor, W. I. Grubb, district judge, which term is not yet adjourned, the above-captioned cause came on for trial, and the following proceedings were had not appearing otherwise of record:

By consent of all parties hereto, and for the sake of brevity as and for a bill of exceptions the stipulated facts appearing at pages 15 to 22 of this transcript, are hereby referred to and by such reference incorporated in and made part of this bill of exceptions as fully as though the same were set forth herein in haec verba.

The said stipulated facts was all and the only evidence in the case. The evidence was duly closed.

The defendant then presented to the court written findings of fact, numbered I to VII, both inclusive, with the request that the same be entered and allowed. Upon consideration of the same, the court made and entered an order thereon, finding the facts stated in said findings so presented by the defendant to be true, but

34 being of the opinion that all of the facts except those stated in the first paragraph of the stipulation of fact were irrelevant, excluded the same from its consideration, to which action of the court the defendant then and there duly excepted, which exception was allowed. The said findings of fact and the order of court made thereon appear at pages 22 to 27 of this transcript and are hereby referred to, and by such reference made part hereof as fully as though the same were set forth herein in detail.

The plaintiff, the United States of America, then presented to the court written findings of fact numbered I and II, with the request that the same be entered and allowed, which findings of fact were given and allowed by the court as a findings of fact in this cause, to which action of the court the defendant then and there excepted, which exception was allowed. The said findings of fact as given and the order made and entered allowing the same, as also defendant's exception thereto appear at pages 27 to 29 of this transcript, and are hereby referred to and by such reference made part hereof as fully as though the same were set forth herein in detail.

Thereupon the defendant moved for a judgment of acquittal. The court overruled and disallowed the motion, whereupon the defendant excepted, which exception was duly allowed. The plaintiff, the United States of America, then made a motion for a judgment of guilt, which motion was duly allowed by the court, to which action of the court the defendant duly reserved an exception, which
55 exception was duly allowed. Defendant's motion and the order and exception thereto, appear at pages 29 to 31 of this transcript. The said motions, orders, and exceptions are hereby referred to and by such reference made part of this bill of exceptions, as fully as though the same were set forth herein in haec verba.

And now in furtherance of justice and that right may be done the defendant, Gus L. Constantine, presents the foregoing as and for his bill of exceptions in the above-entitled cause and prays that the same may be settled, allowed, and filed as such.

WILLIAM S. PRITCHARD,
Of Counsel for Defendant.

APPROVAL OF COUNSEL

This is to certify that the foregoing bill of exceptions in the above-entitled cause was served on me on this the 22nd day of December 1934, and that I have carefully examined the same, and have no amendments to suggest thereto, and consent that the same may be approved by the Honorable W. I. Grubb, judge of this court, without my being present, and without further notice to me.

JIM C. SMITH,
United States Attorney.

36 In United States District Court

Order of court approving bill of exceptions

It is ordered by consent of all parties at interest that the above and foregoing be, and the same is herewith, duly signed, certified, and allowed as the bill of exceptions in this cause, and as being true and correct, and as containing all of the evidence offered on the trial of the cause, and the same is hereby made part of the record in this cause and ordered to be filed as such.

Done at Birmingham, Alabama, this the 22nd day of December 1934.

W. I. GRUBB,
United States Judge,
Trial Judge in Said Cause.

37 In United States District Court

Assignment of error

Filed December 18, 1934

Comes now the defendant, Gus L. Constantine, by his attorneys, and files and presents to the court his assignments of error herein, wherein the defendant, as appellant, assigns as error in the record and proceedings of the District Court of the United States within and for the Southern Division of the Northern Judicial District of Alabama, in the above-entitled cause, the following particulars and errors, to wit:

1. That the court erred in overruling the defendant's demurrer to the information filed on the 3rd day of December 1934, and overruled by the court on the 3rd day of December 1934; over the exception of the defendant at the time.

2. That the court erred in overruling the defendant's motion to quash the information, filed on the 3rd day of December 1934, and overruled by the court on the 3rd day of December 1934; over the exception of the defendant at the time.

3. That the court erred in holding that the facts set forth in the information and stipulation of facts constituted a crime under the laws of the United States.

38 4. That the court erred in holding that the facts set forth in the information and stipulation of facts constituted an offense under section 206, title 26, U. S. C. A. (section 701 of the Revenue Act of 1926).

5. That the court erred in overruling the defendant's written request offered to the court after the filing of the stipulation of facts agreed to as being true in this cause, wherein and whereby defendant requested the court to find the defendant not guilty, and to return a verdict of acquittal, for the reason that under the law and the evidence in this cause, no offense was committed by this defendant against the laws of the United States; and the refusal of which request was then and there excepted to by the defendant.

6. The court erred in entering judgment in favor of the United States, while in fact and in law it should have been entered in favor of the defendant.

7. The court committed error in holding that the levy imposed by section 206, title 26, U. S. C. A., was a true tax, and not a penalty.

8. The court erred in denying and refusing to grant the findings of fact as requested by the defendant.

9. The court erred, separately and severally, in excluding from the evidence separately and severally each of the findings numbered V to VII, both inclusive, as set forth in defendant's requested findings of fact.

10. The Court erred in entering the findings of fact as given in this cause, at the request of the plaintiff, United States.

39 11. The court erred in excluding from its consideration in this cause the facts found by the court to be true, but excluded from its consideration as shown and set forth in plaintiff's requested findings of fact and the order of court made and entered thereon.

Wherefore, the defendant, Gus L. Constantine, prays that the judgment of the District Court aforesaid, on the information filed herein, on account of each one of the separate and several assignments of error above set out, and for other plain and manifest errors in the record of the trial of this cause, be reviewed, reversed, and annulled, and that such further orders be made herein as are mete and proper in the premises; and that the defendant be discharged from the judgment against him and restored to all rights of which he has been deprived by reason of the verdict and judgment of the court herein complained of.

W. S. PRITCHARD, and
HILL, HILL, WHITING, THOMAS & RIVES,
Attorneys for Appellant.

Presented this 18th day of December 1934.

W. I. GRUBB, *District Judge.*

40 In United States District Court

Notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit

Filed December 5, 1934

Name and address of appellant: Gus L. Constantine, 630 South 18th Street, Birmingham, Alabama.

Name and address of appellant's attorney: William S. Pritchard, 210 1st Natl. Bank Bldg., Birmingham, Ala.; and Hill, Hill, Whiting, Thomas and Rives, Montgomery, Alabama.

Offense: Violation of section 206, title 26, U. S. C. A.

Date of judgment: December 3rd, 1934.

Brief description of judgment or sentence: Sentenced to pay a fine of $250 to stand committed.

Name of prison where now confined if not on bail: On bail of $500.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the judgment above mentioned on the grounds set forth below.

(Signed) GUS L. CONSTANTINE,
Appellant.

Dated: December 4, 1934.

41 Grounds of appeal:

1. The court committed error in overruling the demurrers filed by the defendant to the information, the basis of this proceeding, separately and severally upon each of the separate and several grounds set forth in the demurrers hereunto filed herein.

2. The court committed error in overruling the defendant's motion to quash the information, filed by the defendant in this cause, to said information, the basis of the proceeding against him, separately and severally upon each of the separate and several grounds set forth in the said motion to quash heretofore filed herein.

3. The court committed error in finding the defendant guilty and imposing the sentence as imposed herein under the law and stipulated facts of this case.

4. The court committed error in refusing defendant's request to find defendant not guilty under the law and stipulated facts herein.

Service accepted 12-5-34.

JIM C. SMITH,
U. S. Attorney.

42 [Bond on appeal for $200 approved and filed Dec. 4, 1934, omitted in printing.]

44 In United States District Court

Stipulation as to transcript of record

Filed December 26, 1934

It is hereby stipulated by counsel representing the government and counsel representing the defendant in the above-entitled cause that in making up the record herein for transmission to the United States Circuit Court of Appeals for the Fifth Circuit that the clerk of the District Court for the Southern Division of the Northern District of Alabama, shall include therein only and in the order named the following:

1. The information.
2. The demurrer of the defendant to the information.
3. Order overruling the demurrer and defendant's exception thereto.
4. Defendant's motion to strike the information.
5. Order disallowing the motion to strike, and defendant's exception thereto.
6. Written stipulation waiving trial by jury.
7. Defendant's plea of not guilty.
8. Facts as stipulated.
9. Defendant's requested findings of fact, conclusions of law and order thereon; and defendant's exception thereto.

45 10. The court's findings of fact and conclusions of law. Defendant's exception thereto.

11. Motion of United States to find defendant guilty and order thereon, and defendant's exception thereto.
12. Defendant's motion for judgment of acquittal. Order of court thereon and defendant's exception thereto.
13. Judgment and sentence and judgment of the court.
14. Bill of exceptions.
15. Assignments of error.
16. Notice of appeal and citation.
17. This stipulation.

JIM C. SMITH,
United States Attorney.
WILLIAM S. PRITCHARD,
Of Counsel for Defendant.

46 [Clerk's certificate to foregoing transcript omitted in printing.]

47 [Minute entry of argument and submission, February 20, 1935, omitted in printing.]

48 IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7627

GUS L. CONSTANTINE, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Alabama

March 15, 1935

Before BRYAN, HUTCHESON, and WALKER, Circuit Judges

Opinion of the Court Filed—March 15, 1935.

HUTCHESON, Circuit Judge: Appellant Constantine was convicted of violating sec. 701, Revenue Act of 1926, sec. 206, title 26, U. S. C. A. He was, and for more than a year before the information was filed, had been engaged in Birmingham, Alabama, in the business of a retail liquor dealer in malt liquors having an alcoholic content of more than ½ of 1%. For the year 1933–34 he paid the $20 tax prescribed by sec. 205 (c) 26 U. S. C. A., for retail dealers in malt liquors. For the year 1934–35 he paid the $25 tax prescribed by sec. 205 (a) 26 U. S. C. A., for retail liquor dealers.
49 When these respective payments were made, though to deal in malt liquors as he was proposing to do was in violation of

the laws of the city of Birmingham and the State of Alabama, this was all the tax that was demanded of him. He was not requested to pay the special excise tax of $1,000 imposed by sec. 701, act of 1926, for the failure to pay which he has been prosecuted. He supposed, and with reason, that he was fully paying all the taxes the Government would require of him, for at that time what is now claimed to be a tax, was by the Treasury ruling and by Department regulations and practices, declared and recognized not to be a tax, but a penalty.[1] The district judge found the facts of departmental and administrative acts and rulings to be as set out in note 1, but he thought them immatedial. He thought the intention and effect of the statute to impose a tax plain on its face; that the tax was valid, and that the defendant, having failed to pay it, was subject to be prosecuted and convicted under it. We do not find the statutory intent and effect so plain as that its history and administrative interpretation may not be looked to for the light they throw. Nor, looking to them and construing the statute with their aid, are we able to agree with the district judge that it impose a tax, rather than a penalty. We agree rather with appellant, that the
50 statute did not attempt to, it did not, impose a tax; that it imposed a penalty as part of the enforcing machinery of the eighteenth amendment, and fell with it. We think that the language of the act,[2] in requiring all kinds of handlers of intoxicating liquors to pay the same amount, instead of, as liquor taxing acts do, making the exaction fit the business done, its history from its first introduction on February 24, 1919,[3] after the passage of the

---

Note 1. By Treasury Decision No. 3911 the Department, on June 30, 1926, under taxes classed as penalties, placed that prescribed by sec. 701. On October 4, 1933, after the repeal of the eighteenth amendment, the Commissioner of Internal Revenue issued a mimeograph, #4077, XII–2 C B 500, with regard to internal revenue taxes and duties, continuing with the repeal of the eighteenth amendment. The imposition of sec. 701 was not in this list. The collector of the district of Alabama issued a circular to all beer and liquor dealers—"There is enclosed herewith form 11, on which you are privileged to make application for special excise stamp as a dealer in alcoholic beverages. * * * The rates for the fiscal year, July 1934 to June 1935 are retail liquor dealers, $25." No reference was made in this circular to the tax now claimed. It was only in September 1934 when a change of policy occurred, that the special excise tax imposed by sec. 701 was declared to be a true tax and not a penalty, and the collector of the Alabama District was instructed to collect it, issuing receipts for the $1,000 until stamps could be printed.

Note 2. Miscellaneous Occupational Taxes, sec. 701. "On and after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by sec. 701 of the Revenue Act of 1924, a special excise tax of $1,000 in the case of every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, or manufacturer of stills, as defined in sec. 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

"Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both." Vol. 44, Stats. at Large, p. 95.

Note 3. As it then appeared sub. 12, sec. 1001, Special Taxes, 40 Stats. at Large, p. 1128, its substance was the same as the 1926 enactment, except that instead of providing for the levy of "a special excise tax of $1,000" in the case of the persons affected, it provided that they "shall pay in addition to all other taxes, special or otherwise, imposed by existing law or by this act, $1,000." Another difference between the two acts is that the first did not affix a penalty as the 1926 act did, for engaging in business without paying the $1,000. In 1921 it was reenacted as sub. 12, sec. 1001, Miscellaneous Occupational Taxes, 42 Stats. at Large, 296. In 1924 it was reenacted as sub. 9, sec. 701, Miscellaneous Occupational Taxes, 43 Stats. at Large, 327. Taking its final form in 1926, it has not since been reenacted.

wartime Prohibition Act and the adoption of the eighteenth
51 amendment, the judicial construction [4] given to this section and the general revenue acts, in relation to the National Prohibition Act in general, and sec. 35 of that act, sec 52, title 27, U. S. C. A., and sec. 5 of the Willis-Campbell Act, sec. 3, title 27, U. S. C. A., in particular, the administrative interpretation which has followed these decisions the act of March 22, 1933, 48 Stats. 16, authorizing the manufacture and sale of beer, and generally, the failure of Congress to reenact this section since the repeal of the eighteenth amendment put beyond question that its function and purpose was to penalize and prohibit; that it was enacted as a penalty, not a tax, and that it may not now, the amendment which authorized it repealed, be enforced as a penalty. Bailey vs. Drexel Furniture Co., 259 U. S. 20; Hill vs. Wallace, 259 U. S. 44.

The additional consideration, that it is gravely doubtful whether, if the act be construed as imposing an excise tax, it would be valid, since applicable to some States and portions of States and not to others, it is wanting in that geographical uniformity esesntial to the valid exercise by Congress of such taxing power, further impels to the view that the imposition of the act is not a tax, but a penalty. Knowlton vs. Moore, 178 U. S. 41; Flint vs. Stone-Tracy Co., 220 U. S. 107; Florida vs. Mellon, 273 U. S. 12. It is of course not doubted that Congress may penalize and discourage by taxing, and that the fact that a tax so operates is no objection to it as a tax. United States vs. Yuginovich, 256 U. S. 450, and cases cited in it. Alaska Fish Co. vs. Smith, 255 U. S. 44; One Ford Coupe vs. United States, supra. Particularly is it true that the fact that a business is prohibited by a State law does not prevent the imposition of a Federal tax upon it. License Tax Cases, 72 U. S. 462. It is also certainly true that what is named and exacted as a tax is not converted into a penalty merely because the main purpose and effect of its imposition is to act at a deterrent. In each case
52 of doubt whether an act imposes a penalty or a tax, the question must be determined upon a consideration of its language, its operation and effect, and particularly of the consequences which one or the other construction will entail. It is a cardinal rule that "Where a particular construction of a statute will occasion great inconvenience, or produce inequality and injustice, that view is to be avoided, if another and more reasonable interpretation is present in the statute." Knowlton vs. Moore, supra. And another such rule is that "A statute must be construed if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." United States vs. La Franca, supra. Baender vs. Barnett, 255 U. S. 244; United States vs. Jin Fuey Moy, 241 U. S. 394.

Note 4. United States vs. Yuginovich, 256 U. S. 450, United States vs. Stafoff, 260 U. S. 477; Lipke vs. Lederer, 259 U. S. 560; United States vs. La Franca, 282 U. S. 568; United States vs. One Ford Coupe, 272 U. S. 321; Fontenot vs. Accardo, 278 Fed. 871.

The application of these rules to the construction of this statute leaves us in no doubt that we must construe its imposition as a penalty, and not as a tax. Its lumping under one head, and subjecting to one tax all persons engaged in any branch of the liquor business, instead of classifying them and taxing each in accordance with the business he engages in, as revenue acts commonly do, is highly significant that the act was intended to be, and was a penalty measure. Significant, too, is its ambulatory character, applying not by application in particular localities of a rule geographically uniform, but by its own terms now here, now there, in this or that State, this or that locality according to State laws or local conditions. The administrative rulings and acts of departmental officers treating it as a penalty section when enacted, and as repealed with the amendment, when considered by themselves, have the same significance. When all of these things are considered in connection with the inconvenience and injury to the revenue of this prohibitive exaction, and
the injustice to the dealers who, in reliance upon these rulings,
53 have paid the taxes demanded, it stands out more clearly that this is the more reasonable view. When, in addition to all of this, the doubtful constitutionality of the section for want of geographical uniformity; if construed as a taxing act, is considered, we think assurance is made doubly sure that it should not be so construed.

The judgment of conviction may not stand. It is reversed and the complaint is dismissed.

54 In United States Circuit Court of Appeals

No. 7627

GUS L. CONSTANTINE

v.

UNITED STATES OF AMERICA

Judgment

March 15, 1935

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by the counsel;

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed and the complaint is dismissed.

55 In United States Circuit Court of Appeals

Petition for rehearing filed

March 25, 1935

Comes the United States of America, appellee in the above-styled cause, and petitioner herein, by its attorney, and petitions the court to grant a rehearing in this cause, and to set aside the judgment of reversed herein, on, to wit, March 15, 1935, and to render a judgment affirming the judgment in this cause rendered by the District Court of the United States in and for the Northern District of Alabama, assigning as grounds for its said petition the following:

1. The court erred in holding that section 701 of the revenue Act of 1926 (section 206, title 26, U. S. C. A.) did not impose a tax.

2. The court erred in holding that section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) did impose a penalty.

3. The court erred in holding that section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) imposed a penalty as a part of the enforcing machinery of the eighteenth amendment and fell with the repeal of said amendment.

4. The court erred in holding that the classification proved by section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) was not a reasonable one.

56 5. The court erred in holding that if section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) were construed as levying a tax, there was doubt as to its constitutionality because of lack of uniformity.

6. The court erred in holding that if the levy imposed by section 701 of the Revenue Act of 1926 (section 206, title 26, U. S. C. A.) were held to be a tax, it was not uniform in its application.

7. The court erred in holding that the District Court found the facts of departmental and administrative acts and rulings to be as set out in note 1 of the decision.

8. The court erred in holding that the facts excluded by the District Court from its consideration, said facts being contained in paragraphs 5 to 7, both inclusive, of findings of fact presented by the defendant (appellant), (Tr., p. 22), were improperly so excluded.

9. The court erred in reversing the judgment of the District Court and dismissing the complaint.

JIM C. SMITH,
JIM C. SMITH,
United States Attorney.

57 CERTIFICATE

I, Jim C. Smith, United States attorney for the Northern District of Alabama, attorney of record for the United States of America, appellee and petitioner in the foregoing petition for rehearing, do hereby certify that this petition for rehearing is presented in good faith, and that, in my opinion, the same is well founded and is not presented for the purpose of creating delay.

This the 22 day of March 1935.

JIM C. SMITH,
United States Attorney.

I hereby certify that on the 22 day of March 1935 I mailed to Honorable William S. Pritchard, attorney of record for the appellant, a copy of this application and attached brief.

JIM C. SMITH,
United States Attorney.

58 In United States Circuit Court of Appeals

[Title omitted.]

Order denying rehearing

April 2, 1935

It is ordered by the court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

59 [Clerk's certificate to foregoing transcript omitted in printing.]

60 Supreme Court of the United States

Order allowing certiorari

Filed June 3, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File no. 39566. U. S. Circuit Court of Appeals, Fifth Circuit. Term no. 40. The United States of America, petitioner, vs. Gus L. Constantine, alias Dr. Gus. Petition for a writ of certiorari and exhibit thereto. Filed May 2, 1935. File no. 40 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

[redacted]

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	4

CITATIONS

Cases:	
Bailey v. *Drexel Furniture Co.*, 259 U. S. 20	8
Brabham v. *Cooper, Collector*, 9 F. Supp. 904	10
Cleveland v. *Davis, Collector*, S. D. Ala., unreported	10
Florida v. *Mellon*, 273 U. S. 12	9
Green v. *Page, Collector*, 9 F. Supp. 844	10
Head Money Cases, 112 U. S. 580	9
Knowlton v. *Moore*, 178 U. S. 41	9
Liberis v. *Nee, Collector*, N. D. Fla., unreported	10
License Tax Cases, 5 Wall. 462	9
McCray v. *United States*, 195 U. S. 27	7
Senate Club v. *Viley, Collector*, D. Idaho, unreported	10
United States v. *Arthofer*, N. D. Tex., unreported	9
United States v. *Columbia Fruit Products Co.*, E. D. Pa., unreported	9
United States v. *Doremus*, 249 U. S. 86	7
United States v. *Kesterson and Roberts*, 8 F. Supp. 680	9
United States v. *La Franca*, 282 U. S. 568	7
Veazie Bank v. *Fenno*, 8 Wall. 533	7
Statute:	
Revenue Act of 1926, c. 27, 44 Stat. 9, 95 (U. S. C. App., Title 26, Sec. 206)	11–12
Miscellaneous:	
H. Rept. 767, 65th Cong., 2d Sess. (Cong. Doc. 7308)	5, 6

132248—35

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 938

UNITED STATES OF AMERICA, PETITIONER

v.

GUS L. CONSTANTINE, ALIAS DR. GUS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above case on March 15, 1935 (R. 50), a petition for a rehearing having been denied April 2, 1935 (R. 51), reversing a judgment of the District Court of the United States for the Northern District of Alabama.

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 47) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 15, 1935 (R. 50), and a peti-

tion for rehearing denied April 2, 1935 (R. 51). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure With Respect to Proceedings in Criminal Cases after Verdict or Finding of Guilt, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether Section 701 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 95, U. S. C. App., Title 26, Sec. 206), imposing a special excise tax of $1,000 on persons carrying on the business of a brewer, distiller, wholesale or retail liquor dealer, wholesale or retail dealer in malt liquor, or manufacturer of stills, in any place where such business is prohibited by the law thereof, is valid, in view of the repeal of the Eighteenth Amendment.

STATUTE INVOLVED

Section 701 of the Revenue Act of 1926 will be found in the Appendix, *infra*, pp. 11–12.

STATEMENT

On November 21, 1934, the United States Attorney for the Northern District of Alabama filed an information in the District Court of the United States for that district, charging that the respondent on October 8, 1934, at Birmingham, Alabama, carried on the business of a retail dealer in malt liquor, which business was contrary to the laws of the State of Alabama, without having paid the

special excise tax of $1,000 as required by Section 701 of the Revenue Act of 1926 (R. 2).

A demurrer and a motion to quash the information were filed by the respondent, the principal grounds being the alleged invalidity of Section 701 (R. 5–13). The demurrer and the motion to quash were overruled (R. 31). The respondent then pleaded not guilty and waived a jury trial (R. 14).

A stipulation of facts was signed by attorneys for the respondent and the United States Attorney, and filed (R. 15–21). It admitted that the respondent was carrying on the business of a retail dealer in malt liquors at the time stated in the information, in violation of the laws of Alabama and of Birmingham, and that he had not paid the $1,000 prescribed by Section 701, *supra,* though he had paid the $25 tax imposed upon retail liquor dealers by R. S. 3244 as amended (U. S. C., Title 26, Sec. 205), for the current year (July 1, 1934, to June 30, 1935). The stipulation stated further that no demand for the $1,000 levy was made upon the respondent until about October 1, 1934. The court found as a conclusion of law that the respondent had violated Section 701 and "That the said section provided for a tax and not a penalty and that the tax so provided, was a valid tax" (R. 28). The respondent was accordingly sentenced to pay a fine of $250 (R. 32).

This judgment was reversed by the Circuit Court of Appeals for the Fifth Circuit (R. 54).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 701 "imposed a penalty as part of the enforcing machinery of the Eighteenth Amendment, and fell with it."

2. In holding in effect that Section 701 imposes not an excise tax but a penalty dealing with a subject left or committed by the Constitution to the control of the States.

3. In holding that even if Section 701 be construed as imposing an excise tax, it would be invalid because "it is wanting in that geographical uniformity essential to the valid exercise by Congress of such taxing power."

4. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision below is erroneous.

(a) Section 701 imposes an excise tax under the general power of Congress to tax, and not a penalty for violation of liquor prohibition laws.

Section 701 in substantially its present form appears first as subsection 12 of Section 1001 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1128, which was approved February 24, 1919. The Revenue Bill was, of course, pending before Congress for a considerable period of time and the House Report on the Bill, referred to below, which was submitted to the House on September 3, 1918, reveals that the tax in question was then included in the Bill. The Eighteenth Amendment to the Con-

stitution was not ratified until January 29, 1919, and did not become effective until one year later (U. S. C., Amendment 18, Secs. 1, 3). The National Prohibition Act, c. 85, 41 Stat. 305, was not enacted until October 28, 1919, and except as to the wartime prohibition and certain other provisions, was not in force until the effective date of the Eighteenth Amendment (Sec. 21, Title III).

Subsection 12 of Section 1001 of the Revenue Act of 1918 was reenacted as subsection 12 of Section 1001 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 296; as subsection 9 of Section 701 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327; and finally as Section 701 of the Revenue Act of 1926.

House Report, No. 767, 65th Congress, 2d Session, on the Revenue Bill of 1918, found in House Reports, Vol. 1, 65th Congress, 2d Session (Cong. Doc. 7308), under the heading Title X, Special Taxes, states (p. 35):

> After considering all the special tax sources suggested to your committee it has endeavored to select such special taxes as would yield considerable revenue and at the same time well distribute the burden of taxation and be capable of satisfactory administration by the Treasury Department. It is believed that the special taxes recommended in the proposed bill will yield about $165,000,000 annually.
>
> The following table shows the special taxes levied under existing law and the proposed bill:
>
> * * * * *

The tax in question is listed among twenty-eight others, including taxes upon pawnbrokers, circuses, bowling alleys, riding academies, shooting galleries, and the use of yachts. This report was submitted September 3, 1918. There is not the slightest reference in the report to any relation of the tax to the Eighteenth Amendment, or to its aiding in the enforcement of the liquor prohibition laws in dry States.

The tax is listed in the report as follows:

> Carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, or manufacture of stills, contrary to the laws of any State, Territory, or District, in any place in which carrying on such business is prohibited by local or municipal law, in addition to all other taxes . . . . $1,000.00.

Such a business was an obvious source of revenue to finance the War. The illicit dealer in liquor is a distinct species, differing essentially from the legitimate dealer, and was therefore properly classified for taxation purposes in a separate category. Section 1001 of the Revenue Act of 1918, in which the proposed tax was enacted, contains eleven other special occupational taxes—brokers, pawnbrokers, ship brokers, customhouse brokers, proprietors of theatres, of circuses, of other public exhibitions, of bowling alleys, of shooting galleries, of riding academies, and persons operating automobiles for hire. Various distinctions in these occupations are made. Thus a broker who was a member of a

stock exchange paid more than one who was not. A theatre proprietor in a town of five thousand inhabitants or less was treated differently from one in a larger city. Chautauquas were exempted entirely.

The twelve items were continued in the Revenue Act of 1921. Proprietors of theatres, circuses, and other public exhibitions were omitted in the corresponding section of the Revenue Act of 1924. All except the unlawful liquor dealer were omitted in the Revenue Act of 1926.

There is thus nothing to indicate that Congress was attempting primarily to stamp out the unlawful traffic in liquor by the imposition of this levy. But the mere fact that Congress in selecting the subject for taxation did have some social or governmental effect in mind, would not invalidate the law. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *McCray* v. *United States,* 195 U. S. 27; *United States* v. *Doremus,* 249 U. S. 86.

In *United States* v. *La Franca,* 282 U. S. 568, the United States was suing to recover, among other items, $1,500, being the special tax imposed by Section 701 of the Revenue Act of 1924 for nine months, that is, $750 doubled under Section 35, Title II, of the National Prohibition Act (U. S. C., Title 27, Sec. 52). The defense was a prior criminal conviction for the same acts giving rise to the special tax. This Court, in sustaining that defense, refers to the *doubled* tax as in its nature a penalty though called a tax.

There is no doubt that the doubling of the tax by the National Prohibition Act converted it into a penalty. It does not follow, however, that with the National Prohibition Act repealed, the levy of the tax in its original form constitutes a penalty.

In *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 36, this Court held unconstitutional the so-called child-labor tax of the Revenue Act of 1918, 40 Stat. 1138, by which was imposed a levy of ten percent of the net profits of any person employing children below certain specified ages in mines and factories because, while in the form of a tax, it really imposed a penalty "for a departure from a detailed and specified course of conduct in business." It said that this was apparent on the face of the statute itself, because of its provision granting relief from the tax because of lack of knowledge of the age of the child employed, its provisions permitting inspection of factories and mines not only by the taxing officers of the Treasury but also by the Secretary of Labor and his subordinates, etc. The Court accordingly declared the Act invalid as being an attempt by Congress, in the guise of a taxing measure, to regulate a subject which was exclusively a State function under the Federal Constitution.

The levy involved in the above case is clearly distinguishable from that imposed by Section 701. There is no purpose to control State action in the latter. The obvious purpose is to raise revenue from an occupation which the State prohibits. The

tax gives no right to conduct the occupation prohibited by the State. But the mere fact that it is so prohibited does not prevent the exercise by Congress of its taxing power. *License Tax Cases,* 5 Wall. 462, 472–473.

It is submitted therefore that Section 701 clearly imposes a tax and not a penalty.

(b) The tax is uniform within the meaning of the Constitution.

The constitutional requirement is geographical uniformity throughout the United States. That uniformity exists where, as in the instant case, the tax operates with the same force and effect wherever the subject of it is found. *Head Money Cases,* 112 U. S. 580, 594; *Knowlton* v. *Moore,* 178 U. S. 41, 108–109; *Florida* v. *Mellon,* 273 U. S. 12, 17.

2. While there is as yet no conflict of decisions among the Circuit Courts of Appeals, there is considerable conflict among the District Courts. In addition to the District Court for the Northern District of Alabama in the instant case, the District Court for the Northern District of Oklahoma in *United States* v. *Kesterson,* 8 F. Supp. 680,[1] and the District Courts for the Northern District of Texas and the Eastern District of Pennsylvania in *United States* v. *Arthofer* and *United States* v. *Columbia Fruit Products Co.* (both unreported), have held that Section 701 is valid. On the other

[1] In this case the Circuit Court of Appeals on April 8, 1935, held on an appeal that Section 701 is invalid. Its decision has not yet been reported. The Government intends to apply for a writ of certiorari to review this decision.

hand, the District Courts for the Eastern District of South Carolina, the Southern District of Alabama, the Southern District of Georgia, the Northern District of Florida, and the District of Idaho, have held the statute invalid in the following cases: *Brabham* v. *Cooper, Collector,* 9 F. Supp. 904; *Cleveland* v. *Davis, Collector* (unreported); *Green* v. *Page, Collector,* 9 F. Supp. 844; *Liberis* v. *Nee, Collector,* and *Senate Club* v. *Viley, Collector* (both unreported). A number of other suits are now pending in the District Courts and decisions are being withheld pending the final disposition by this Court of the instant case.

3. The Treasury Department has been and is proceeding to collect this special excise tax, and since the repeal of the Eighteenth Amendment a total of $627,819.02 has been collected up to and including the week ended March 16, 1935. The total assessments made for the tax from July 1, 1934, to February 28, 1935, inclusive, amount to $7,048,308.97. A decision by this Court upon the validity of this special excise tax is thus highly desirable as a guide to the administrative officers and the courts below and would be in the public interest generally.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

MAY 1935.

APPENDIX

Section 701 of the Revenue Act of 1926 (U. S. C. App., Title 26, Sec. 206) provides that—

> On and after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by section 701 of the Revenue Act of 1924, a special excise tax of $1,000, in the case of every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both.

U. S. GOVERNMENT PRINTING OFFICE: 1935

FILED
OCT 5 19
CHARLES ELMORE CR

FILE COPY

No. 40

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE UNITED STATES OF AMERICA, PETITIONER

v.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Specification of errors to be urged	8
Summary of argument	9
Argument:	
I. Section 701 did not impose "a penalty as part of the enforcing machinery of the Eighteenth Amendment" and therefore did not fall with the repeal of that Amendment	11
II. Section 701 imposes an excise tax and does not infringe upon the reserved powers of the States	33
III. The tax meets the uniformity requirement of the Constitution	45
Conclusion	48
Appendix	50

CITATIONS

Cases:	
Child Labor Tax Case (*Bailey* v. *Drexel Furniture Co.*), 259 U. S. 20	10, 33, 40, 45
Clark Distilling Co. v. *Western Md. Ry. Co.*, 242 U. S. 311	47, 48
Florida v. *Mellon*, 273 U. S. 12	47
Head Money Cases, 112 U. S. 580	46
Hill v. *Wallace*, 259 U. S. 44	10, 33, 40, 41, 45
Kesterson v. *United States*, 76 F. (2d) 913, No. 46, Oct. Term, 1935	34
Knowlton v. *Moore*, 178 U. S. 41	47
LaBelle Iron Works v. *United States*, 256 U. S. 377	45
License Tax Cases, 5 Wall. 462	10, 34, 35–40, 42
Lipke v. *Lederer*, 259 U. S. 557	18, 25
McCaughn v. *Hershey Chocolate Co.*, 283 U. S. 488	29
Nigro v. *United States*, 276 U. S. 332	44
Phillips v. *Commissioner*, 283 U. S. 589	47, 48
Poe v. *Seaborn*, 282 U. S. 101	47
Regal Drug Co. v. *Wardell*, 260 U. S. 386	18, 20
State Railroad Tax Cases, 92 U. S. 575	47
United States v. *Chambers*, 291 U. S. 217	4

Cases—Continued. Page

United States v. *Doremus*, 249 U. S. 86 ..... 10, 43, 45
United States v. *La Franca*, 282 U. S. 568 ..... 18, 23
United States v. *Morehead*, 243 U. S. 607 29
United States v. *One Ford Coupe*, 272 U. S. 321 ..... 19, 21, 24, 33
United States v. *Singer*, 15 Wall. 111 47
United States v. *Stafoff*, 260 U. S. 477 21
United States v. *Sullivan*, 274 U. S. 259 33
United States v. *Yuginovich*, 256 U. S. 450 33
Utah v. *United States*, 284 U. S. 534 25
Various Items v. *United States*, 282 U. S. 577 20

Statutes:

Act of October 1, 1890, Section 53, c. 1244, 26 Stat. 567 (U. S. C., Title 26, Sec. 186) 50
Act of March 3, 1917, 39 Stat. 1069, Section 5 14
Beer Act, March 22, 1933, c. 4, 48 Stat. 16 29
Liquor Repeal and Enforcement Act of August 27, 1935 (Pub., No. 347, 74th Cong.) 30
Liquor Taxing Act of 1934, c. 1, 48 Stat. 313:
Section 9 (a) 30
National Prohibition Act, c. 85, 41 Stat. 305:
Section 9, Title II (U. S. C., Title 27, Sec. 21) 26
Section 21, Title III 12
Section 35, Title II (U. S. C., Title 27, Sec. 52) 10, 18
Revenue Acts:
1918, c. 18, 40 Stat. 1057:
Section 608 29
Section 1001 11
Section 1005 12
1921, c. 136, 42 Stat. 227:
Section 1001 15
Section 1004 15
1924, c. 234, 43 Stat. 253:
Section 701 15
Section 704 15
1926, c. 27, 44 Stat. 9:
Section 701 (U. S. C. App. Title 26, Sec. 206) 2
1935, approved August 30, 1935 (Pub. No. 407, 74th Cong.) 3
Revised Statutes:
Section 3232 (U. S. C., Title 26, Sec. 181) 50
Section 3233 (U. S. C., Title 26, Sec. 182) 50
Section 3238 as amended (U. S. C., Title 26, Sec. 187) 51
Section 3239 as amended (U. S. C., Title 26, Sec. 188) 51
Section 3240 as amended (U. S. C., Title 26, Sec. 189) 52
Section 3244 as amended (U. S. C., Title 26, Sec. 202) 52
Section 3281 as amended (U. S. C., Title 26, Sec. 193) 53
Section 3243 (U. S. C., Title 26, Sec. 201) 54
Section 13 (U. S. C., Title 1, Sec. 29) 4
U. S. C. A., Cumulative Pocket Part, 1934, p. 108 22

Miscellaneous: Page
H. R. 1, 69th Cong., 1st Sess. 16
H. R. 179, 68th Cong., 1st Sess. 16
H. R. 350, 67th Cong., 1st Sess. 16
H. R. 767, vol. 1, 65th Cong., 2d Sess. (Cong. Doc. 7308) 13
Internal Revenue:
Alcohol Tax Unit Circular No. 16, July 18, 1934 28
Post Office Department:
Liquor Bulletin No. 2, issued June 15, 1917 14
S. R. 52, 69th Cong., 1st Sess. 16
S. R. 275, 67th Cong., 1st Sess. 16
S. R. 398, 68th Cong., 1st Sess. 16
S. R. 617, 65th Cong., 3d Sess. 14
Treasury Department:
Mimeograph No. 4077 (XII-2 Cumulative Bulletin, p. 500) 27

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 40

THE UNITED STATES OF AMERICA, PETITIONER

v.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 22) is reported in 75 F. (2d) 928.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 15, 1935 (R. 25), and a petition for rehearing denied April 2, 1935 (R. 27). The petition for a writ of certiorari was filed May 2, 1935, and was granted June 3, 1935 (R. 27). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure With Respect to Proceedings in Criminal Cases after Verdict or Finding of Guilt, promulgated by this Court May 7, 1934, and effective September 1, 1934, the finding of guilt having been rendered December 3, 1934 (R. 14–15).

QUESTION PRESENTED

Whether Section 701 of the Revenue Act of 1926, *infra*, imposing a special excise tax of $1,000 on persons carrying on the business of a brewer, distiller, wholesale or retail liquor dealer, wholesale or retail dealer in malt liquor, or manufacturer of stills, in any place where such business is prohibited by the law thereof, became invalid with the repeal of the Eighteenth Amendment, where the business was carried on contrary to a State law or the local or municipal law of a place within a State.

STATUTE INVOLVED

Section 701 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 95 (U. S. C. A., Title 26, Sections 206, 192), provides as follows:

> On and after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by section 701 of the Revenue Act of 1924, a special excise tax of $1,000, in the case of every person carrying

on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both.[1]

[1] By the Revenue Act of 1935, approved August 30, 1935 (Pub., No. 407, 74th Cong.), it was provided in Section 403 that "The special excise tax imposed by section 701 of the Revenue Act of 1926 (U. S. C., Title 26, Section 206) shall not apply with respect to carrying on business after June

The above section is included in Title VII of the Revenue Act of 1926 under the heading "Special Taxes." Pertinent administrative statutory provisions relating to special taxes are printed in the Appendix, *infra*, pp. 50–52. Reference is also made in the Appendix (*infra*, pp. 52–54) to other special taxes imposed upon brewers, ~~distillers~~, etc.

STATEMENT

On November 21, 1934, the United States Attorney for the Northern District of Alabama filed an information in the District Court of the United States for that district charging that the respondent, on October 8, 1934, at Birmingham, Alabama, carried on the business of a retail dealer in malt liquor, which business was contrary to the laws of the State of Alabama, without having paid the special excise tax of $1,000 as required by Section 701 of the Revenue Act of 1926 (R. 1).

30, 1935." Unless the section fell with the repeal of the Eighteenth Amendment, the repeal thereof by the Revenue Act of 1935 did not operate to extinguish either the liability of the respondent for the tax or the penalty incurred by him for failure to pay, it having been alleged in the information that the respondent carried on the business of a retail dealer in malt liquors contrary to State law on October 8, 1934 (R. 1), and Section 13 of the Revised Statutes (U. S. C., Title 1, Section 29) providing that "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." See *United States* v. *Chambers*, 291 U. S. 217.

A demurrer and a motion to quash the information were filed by the respondent, the principal grounds of which were the alleged invalidity of Section 701 (R. 2, 6). The demurrer and the motion to quash were overruled (R. 5, 6). The respondent then pleaded not guilty and waived a jury trial (R. 7).

A stipulation of facts was signed by attorneys for the respondent and the United States Attorney and filed (R. 7–9). The court thereupon found the facts to be those contained in the first paragraph of the stipulation. The remaining facts recited in the stipulation were found to be true but were rejected by the court as irrelevant to the issues presented (R. 14).

The stipulated facts as found by the court were as follows (R. 7–8):

For the fiscal year July 1, 1934, to June 30, 1935, the respondent registered with the Collector of Internal Revenue as a retail liquor dealer and paid the $25 tax imposed upon retail liquor dealers by Revised Statutes, Section 3244, as amended (*infra*, p. 53). On the date stated in the information (October 8, 1934) the respondent was carrying on at his restaurant in the City of Birmingham, Alabama, the business of a retail liquor dealer in malt liquors containing more than one-half of one percent alcohol. The carrying on of such a business was contrary to the laws of the State of Alabama and the City of Birmingham. The respondent had not at any time, however, paid the $1,000

special excise tax prescribed by Section 701 of the Revenue Act of 1926.

The stipulated facts rejected by the court as irrelevant were as follows (R. 8–9):

Prior to the fiscal year the respondent received from the Collector of Internal Revenue a circular which showed the taxes due by retail liquor dealers and retail malt liquor dealers for the fiscal year, but did not refer to the special excise tax of $1,000. Although the respondent stated that he was told that he was required to pay no other tax than that shown in this circular, this was denied by the Collector and his agent. The Collector did not have in his possession the $1,000 liquor stamp covering the tax prescribed by Section 701 until about November 27, 1934, and no such stamps were shown to be in existence in any catalogue of stamps issued by the United States prior to September 13, 1934. No demand was made by the Collector of Internal Revenue for the District of Alabama upon the respondent for the payment of the $1,000 levy until about October 1, 1934.

On July 30, 1926, about a month after Section 701 became effective, the Commissioner of Internal Revenue, with the approval of the Acting Secretary of the Treasury, issued Treasury Department Regulation 3911 (R. 10–11), which listed the $20 tax imposed on all retail dealers in malt liquors by Section 3244 of the Revised Statutes (*infra*, p. 53) as a tax but referred to the $1,000 special tax im-

posed by Section 701 on any person carrying on the retail business of dealer in malt liquors contrary to the laws of any State or Territory as a penalty and therefore collectible only by action in court and not in the summary manner permitted in the case of taxes. On September 13, 1934, however, the Commissioner of Internal Revenue issued new instructions to the Collector of Internal Revenue for the District of Alabama, which advised him that the levy was a true tax and not a penalty. These instructions read, in part, as follows (R. 11):

> Prior to the receipt of the $1,000 special excise tax stamps, collectors of internal revenue may accept payment of the tax and issue the stamps at a later date. While section 3183 of the Revised Statutes prohibits the issuance of a receipt in lieu of a stamp, Treasury Decision No. 2341 holds in effect that a taxpayer is entitled to some evidence of payment when he presents a remittance to an internal-revenue officer in satisfaction of a special tax and it is not possible to issue the special tax stamp immediately. It will, therefore, be permissible for collectors to issue receipts on form 1, which receipts will be construed as merely evidence of payment and will not be in lieu of the $1,000 special excise tax stamp.[2]

On motions for judgment made on behalf of each party the motion of the United States was granted (R. 14–15), and the court found as a conclusion of

[2] We are advised that these instructions were issued September 10, 1934, and were contained in Mimeograph 4236.

law that the respondent had violated Section 701 and "That the said section provided for a tax and not a penalty, and that the tax so provided, was a valid tax" (R. 14). The respondent was accordingly sentenced to pay a fine of $250 (R. 16–17). No opinion was rendered by the District Court.

On an appeal by the respondent the Circuit Court of Appeals for the Fifth Circuit reversed the judgment of conviction, holding that Section 701 imposed not a tax but "a penalty as part of the enforcing machinery of the eighteenth amendment and fell with it"; and that even if the section could be construed as imposing an excise tax, it was gravely doubtful whether it would be valid, since applicable to some States and portions of States and not to others, it was wanting in that geographical uniformity essential to the valid exercise by Congress of the taxing power (R. 22–25). Thereafter a petition for rehearing by the United States was denied (R. 26–27), and on June 3, 1935, this Court granted a petition by the Government for a writ of certiorari (R. 27).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 701 "imposed a penalty as part of the enforcing machinery of the eighteenth amendment, and fell with it."

2. In holding in effect that Section 701 imposes not an excise tax but a penalty dealing with a subject left or committed by the Constitution to the control of the States.

3. In holding that even if Section 701 be construed as imposing an excise tax, it would be invalid because "it is wanting in that geographical uniformity essential to the valid exercise by Congress of such taxing power."

4. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

Section 701 of the Revenue Act of 1926 did not impose a penalty as a part of the enforcing machinery of the Eighteenth Amendment and therefore did not fall with the repeal of that Amendment. It had its origin in the Revenue Act of 1918, which was approved February 24, 1919. The House Committee Report on the Revenue Bill of 1918 shows that a provision for the tax was included in the Bill as early as September 3, 1918. The Eighteenth Amendment was not ratified until January 29, 1919, and did not become effective until January 29, 1920. The National Prohibition Act was not enacted until October 28, 1919, and likewise did not become effective until January 29, 1920. The legislative history of this section shows that it was enacted primarily as a revenue measure.

The provision was continued in substantially the same form in the Revenue Acts of 1921 and 1924, and was finally reenacted as Section 701 of the Revenue Act of 1926. While the tax imposed was converted into a penalty during the era of national prohibition because it was required to be

doubled under Section 35, Title II, of the National Prohibtion Act upon evidence of manufacture and sale contrary to Federal law, the elimination of the doubling feature by the repeal of the Eighteenth Amendment restored the tax to its true character as a tax. That Congress regarded the tax as surviving the repeal of the Eighteenth Amendment is evident by its express repeal thereof in the Revenue Act of 1935 as of July 1, 1935.

Section 701 imposes an excise tax. It does not infringe upon the reserved powers of the States. It was established in the *License Tax Cases,* 5 Wall. 462, that such a tax does not give a license to carry on business within a State but merely exempts the taxpayer from penalties under national law if he pays the tax. That case also established that Congress may tax that which the States forbid.

The *Child Labor Tax Case,* 259 U. S. 20, and *Hill* v. *Wallace,* 259 U. S. 44, are readily distinguishable. The Federal statutes there involved disclosed on their very face a purpose to regulate, under the guise of taxes, matters wholly within the control of the States. That, in addition to the primary purpose of raising revenue, the statute may have had the incidental object of aiding the dry States in the discouragement of liquor traffic within their borders is immaterial. In *United States* v. *Doremus,* 249 U. S. 86, 93, this Court said that "If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invali-

dated because of the supposed motives which induced it."

Under repeated decisions of this Court the tax meets the uniformity requirement of the Constitution. An improper delegation of the Federal taxing power to the State legislatures does not result from the fact that liability for the tax is dependent upon State law.

ARGUMENT

I

SECTION 701 DID NOT IMPOSE "A PENALTY AS PART OF THE ENFORCING MACHINERY OF THE EIGHTEENTH AMENDMENT" AND THEREFORE DID NOT FALL WITH THE REPEAL OF THAT AMENDMENT

The legislative history of Section 701 completely refutes the position of the Circuit Court of Appeals that that section was enacted for the purpose of imposing a penalty as a part of the enforcing machinery of the Eighteenth Amendment and was not intended to be a taxing measure designed primarily for the purpose of raising revenue.

Section 701 had its genesis in the Revenue Act of 1918, c. 18, 40 Stat. 1057, which was approved February 24, 1919 (p. 1152). As there enacted, it was the same in substance and the only difference was the purely formal one that the provision imposing the tax was carried in one section (Subdivision 12 of Section 1001, 40 Stat. 1126, 1128), while the provision for a penalty or imprisonment for carrying on business without paying the tax was

carried as a separate section (Section 1005, 40 Stat. 1129, 1130).

The 1918 Revenue Bill was, of course, pending before Congress for a considerable period of time, and the House Report on the Bill, referred to below, which was submitted to the House on September 3, 1918, reveals that the tax in question was then included in the Bill. The Eighteenth Amendment to the Constitution was not proclaimed as ratified until January 29, 1919, and did not become effective until one year later (U. S. C. A., Amendment 18). The National Prohibition Act, c. 85, 41 Stat. 305, 307, was not enacted until October 28, 1919, and except as to the war-time prohibition and certain other provisions was not in force until the effective date of the Eighteenth Amendment (Section 21, Title III, p. 322). It should also be noted that as originally enacted the tax was made effective January 1, 1919, before the Eighteenth Amendment was even ratified, that it was included in a section which dealt with eleven other occupational taxes, and that it was provided in this section that "The taxes imposed by this section shall, in the case of persons upon whom a corresponding tax is imposed by section 407 of the Revenue Act of 1916, be in lieu of such tax." We think it is therefore clearly evident that Section 701 came into being entirely apart and distinct from any purpose on the part of Congress to aid in the enforcement of national prohibition.

That the primary purpose of Section 701 was the raising of revenue is also clearly revealed by the legislative history. In the House Report on the Revenue Bill of 1918, in which Section 701 had its genesis (H. Rep. 767, Vol. 1, 65th Cong., 2d Sess.; Congressional Document No. 7308), it is revealed on the very first page thereof that one of the principal objects of the bill was to aid in financing the war. The Committee on Ways and Means then stated (p. 35):

> After considering all the special tax sources suggested to your committee it has endeavored to select such special taxes as would yield considerable revenue and at the same time well distribute the burden of taxation and be capable of satisfactory administration by the Treasury Department. It is believed that the special taxes recommended in the proposed bill will yield about $165,000,000 annually.
>
> The following table shows the special taxes levied under existing law and the proposed bill:
>
> * * * * *

Without any comment other than this the tax was listed in the report with more than twenty others, including taxes upon pawnbrokers, circuses, bowling alleys, riding academies, shooting galleries, and the use of yachts. As stated, this report was submitted September 3, 1918. There is not the slightest reference in the report to any relation of the

tax to the Eighteenth Amendment, or, for that matter, to its aiding in the enforcement of the liquor prohibition laws in the then existing dry States.[3]

The businesses in question were an obvious source of revenue to finance the war. At the time the Revenue Act of 1918 was enacted the figures available indicate that there were 27 States which were wholly dry and 11 which were partially dry.[4]

In imposing higher taxes on the illicit dealer than the legitimate dealer (see Revised Statutes, Sec. 3244, p. 53, *infra*), Congress was, of course dealing with distinct classes of people. The greater profits accruing ordinarily to the illicit dealer and the greater difficulty and expense in collecting the taxes served to differentiate the illegal from the legal dealers in classifying them for tax purposes. Eleven other special occupational taxes were imposed by the section of the Revenue Act of 1918 in which the tax in question was included—brokers, pawnbrokers, ship brokers, customhouse brokers,

---

[3] The same is true of the report of the Committee on Finance of the Senate (Senate Report No. 617, 65th Cong., 3d Sess., pp. 17–18).

[4] These figures were taken from a bulletin of the Post Office Department (Liquor Bulletin No. 2) issued on June 15, 1917, in connection with Section 5 of the Act of March 3, 1917, effective July 1, 1917 (39 Stat. 1069), which prohibited the carriage by mail of advertisements of intoxicating liquors into "any place or point in any State or Territory of the United States at which it is by the law in force in the State or Territory at that time unlawful to advertise or solicit orders for such liquor * * *."

proprietors of theatres, of circuses, of other public exhibitions, of bowling alleys, of shooting galleries, of riding academies, and persons operating automobiles for hire—and a similar process of differentiation was applied as to various of these businesses. Thus a broker who was a member of a stock exchange paid more than one who was not, and a theatre proprietor in a town of five thousand inhabitants or less was treated differently from one in a larger city, while Chautauquas were exempted entirely.

As originally enacted, therefore, there is nothing to indicate that Congress was concerned primarily with anything else than the raising of revenue. National prohibition, except as a temporary war-time expedient, had not yet come into being, and if the rendering of assistance to the dry States played any part in the enactment of the legislation, that part was only incidental to the main purpose of raising revenue.

Without change in substance, the provision in question was carried through reenactment into the Revenue Acts of 1921 (Subsection 12 of Section 1001; Section 1004, c. 136, 42 Stat. 227, 296, 298), and 1924 (Subsection 9 of Section 701; Section 704, c. 234, 43 Stat. 253, 327, 328), and finally into the Revenue Act of 1926 as Section 701. While it was not thereafter repeated in the Revenue Acts, it continued in effect until June 30, 1935, as of which date

it was repealed by the Revenue Act of August 30, 1935 (footnote 1, pp. 3–4, *supra*).[5]

Although thus carried into the prohibition era, there is not the slightest indication anywhere that, chameleonlike, the provision changed in its inherent purpose from being a revenue statute to an instrumentality for the enforcement of national prohibition. Examination of the committee reports on the Revenue Acts of 1921, 1924, and 1926, discloses nothing from which a change in the dominant purpose of the legislation can be deduced.[6]

While the original taxes were reduced from twelve items in the Revenue Acts of 1918 and 1921 to nine items in the Revenue Act of 1924, the proprietors of theatres, circuses, and other public exhibitions being eliminated, and while all of these occupational taxes except that upon the illicit liquor dealer were omitted in Section 701 of the Revenue

---

[5] The provision was carried as unrepealed in both the official and annotated editions of the United States Code which were in effect prior to the Revenue Act of 1935 (U. S. C. Sup. VII, Title 26, Secs. 1395, 1397 (a) (2), and U. S. C. A., Title 26, Sections 206, 192).

[6] Revenue Act of 1921, House Report No. 350, 67th Cong., 1st Sess., p. 15; Senate Report No. 275, 67th Cong., 1st Sess., p. 30; Revenue Act of 1924, House Report No. 179, 68th Cong., 1st Sess., p. 10; Senate Report No. 398, 68th Cong., 1st Sess., p. 10; Revenue Act of 1926, House Report No. 1, 69th Cong., 1st Sess., p. 16; Senate Report No. 52, 69th Cong., 1st Sess., p. 12.

Act of 1926, the committee reports disclose that this gradual elimination of the occupational taxes was occasioned by a mounting surplus in the Treasury which permitted a general reduction of taxes (House Report No. 179, 68th Cong., 1st Sess., p. 1, on the Revenue Bill of 1924), and also because, as stated by the House Committee on Ways and Means in its report on the Revenue Bill of 1926 (House Report No. 1, 69th Cong., 1st Sess., p. 16) "these taxes are not equitable in their application and produce but little revenue." While the inference would seem to be, therefore, that Congress in failing to repeal the tax in question regarded it as a revenue producer and as equitable in application, the important factor is, of course, that at no point in its legislative history did Congress deal with the tax in question as anything but a revenue measure or regard it primarily as an instrumentality for the suppression of the illicit liquor traffic.

In holding that Section 701 imposed a penalty in aid of the enforcement of national prohibition, and not a tax, the court below adverted to certain decisions of this Court relating to the effect of the National Prohibition Act and supplemental legislation upon the tax (R. 24, footnote 4). So far as these decisions have any pertinency they merely disclose that this and other internal revenue taxes which were imposed at the time of the enactment of the National Prohibition Act became penalties

when doubled under Section 35, Title II, of the National Prohibition Act.[1]

The basis of these decisions is that the tax was converted into a penalty when thus imposed because its purpose was to provide a punishment for something which had been made illegal under Federal law; i. e., the manufacture and sale of intoxicating liquor for beverage purposes. As was said in *Lipke* v. *Lederer*, 259 U. S. 557, 562, and reiterated in *United States* v. *La Franca*, 282 U. S. 568, 572, "Evidence of crime (§ 29) is essential to assessment under § 35. It (the imposition) lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty." See also *Regal Drug Co.* v. *Wardell*, 260 U. S. 386. None of these decisions can be said to have held that the basic occupational tax imposed by Section 701, when separated from the excrescence engrafted upon it by Section 35, was

---

[1] This section (c. 85, 41 Stat. 305, 317, U. S. C., Title 27, Sec. 52, provided that the National Prohibition Act—

> shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in [intoxicating] liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers.

anything other than what it purported to be, a tax. Indeed, in *United States* v. *One Ford Coupe*, 272 U. S. 321, a case involving the question whether an automobile seized by a prohibition agent could be forfeited under Section 3450 R. S., where used for the purpose of depositing or concealing tax-unpaid illicit liquors with intent to defraud the United States of the tax imposed thereon, this Court expressly held that the basic tax imposed on distilled spirits did not cease to be a tax and become a penalty by reason of the enactment of the Prohibition Act. In so holding the Court used language particularly persuasive in the instant case. It said (pp. 328–329):

> The claimant contends that the so-called tax on illicitly distilled spirits theretofore imposed ceased to be a tax and became in law a penalty, when the enactment of the National Prohibition Act changed the purpose of the tax from raising revenue to preventing manufacture, sale, and transportation; and that to enforce such penalty by forfeiture of the property rights of innocent third parties would be a denial of due process of law. It is true that the use of the word "tax" in imposing a financial burden does not prove conclusively that the burden imposed is a tax; and that when it appears from its very nature that the imposition prescribed is a penalty solely, it must be treated in law as such. But the imposition here in question is not of that character. A tax on intoxicating liquor does not cease

to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable. What was sought to be enforced and held to be a penalty in *Lipke* v. *Lederer,* 259 U. S. 557, 561, was the so-called double tax. Here, we are dealing with the basic production tax.

With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the product of legal and illegal distillation. The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled, and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it. It is a tax within the meaning of § 3450; and being unpaid makes that section applicable, even if the additional amounts imposed by the Acts be deemed penalties. * * *

See *Various Items* v. *United States,* 282 U. S. 577, 579.

The basic taxes did not change in their nature as taxes merely because Congress had made unlaw-

ful the manufacture and sale of intoxicating liquors for beverage purposes. As was said in *United States* v. *Stafoff*, 260 U. S. 477, 480, "Of course Congress may tax what it also forbids." See also *Ford Coupe* case, pp. 326–327.

Furthermore, in the *La Franca* case, *supra*, while it was held the tax imposed by Section 701 of the Revenue Act of 1924 (the predecessor of the section in question) became a penalty when doubled under Section 35 of the National Prohibition Act, the Court specifically recognized, in considering the effect of Section 5 of the Willis-Campbell Act,[a] that the tax must be considered as having been levied by a law in force prior to the National Prohibition Act, because the statute imposing it was passed in lieu of a similar provision in the Revenue Act of 1918, which was repeated in the Revenue Act of 1921 (pp. 571–572).

While Section 35, the Court said (pp. 575–576) must be considered as having amended the earlier

[a] This section saved all prior Internal Revenue laws which were not directly in conflict with the National Prohibition Act, and provided that if any act was a violation of any such laws and also of the National Prohibition Act a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. The question involved in the *La Franca* case was whether a conviction under the National Prohibition Act for unlawful sales of intoxicating liquor barred a later suit with respect to the same transactions for the taxes imposed upon retail liquor dealers by Revised Statutes, Section 3244, and Section 701 of the Revenue Act of 1924, as doubled by Section 35 of Title II of the National Prohibition Act.

legislation providing for the tax and that, as thus amended, the legislation was to be read, as to all subsequent occurrences, as if it had originally been in the amended form, it is obvious that the Court was there referring only to occurrences which took place subsequent to the passage of Section 35 of the National Prohibition Act. Before that Act was passed the tax was, we submit, a true tax unencumbered by any such penalizing feature as was superimposed by the National Prohibition Act. When that feature was eliminated through the repeal of the Eighteenth Amendment by the Twenty-first Amendment on December 5, 1933 (U. S. C. A. Cumulative Annual Pocket Part for Constitution, 1934, Pt. 3, p. 108), the tax reverted to its true status as a tax. The carrying on of the business of a retail malt liquor dealer contrary to State and municipal law which was made the basis of the charge contained in the information herein, was not alleged to have taken place until October 8, 1934 (R. 1), almost a year after the National Prohibition Act became inoperative.

Considerable stress is placed by the Circuit Court of Appeals upon the administrative practice and rulings in connection with the tax. That court pointed out (R. 22–23) that when the respondent paid the $25 tax on retail liquor dealers imposed by Section 3244 of the Revised Statutes (*infra*, p. 53), no other tax was demanded of him, and he was not requested to pay the special excise tax of $1,000 imposed by Section 701 of the Revenue Act

of 1926, for the failure to pay which he was prosecuted, and stated that:

> He supposed, and with reason, that he was fully paying all the taxes the Government would require of him, for at that time what is now claimed to be a tax, was by the Treasury ruling and by Department regulations and practices, declared and recognized not to be a tax, but a penalty. The district judge found the facts of departmental and administrative acts and rulings to be as set out in note 1, but he thought them immaterial. He thought the intention and effect of the statute to impose a tax plain on its face; that the tax was valid, and that the defendant, having failed to pay it, was subject to be prosecuted and convicted under it. We do not find the statutory intent and effect so plain as that its history and administrative interpretation may not be looked to for the light they throw. * * *

The facts of departmental and administrative acts and rulings to which the court alluded were set forth in the second, third, and fourth paragraphs of the stipulation of facts signed by counsel for both parties and filed in the District Court (R. 8–9). They have been summarized at pages 6–7, *supra*. In rejecting all of the facts recited as irrelevant to the issues presented, we think the District Court acted properly.

The fact that no special excise-tax stamps were available to the Collector until after the date it was charged the respondent carried on business without paying the tax is clearly immaterial. In a circular

issued in September 1934 (Exhibit C to stipulation, R. 8–9, copied at p. 7, *supra*), over a month prior to the date referred to, the Commissioner had instructed the Collector of Internal Revenue for the respondent's district that "Prior to the receipt of the $1,000 special excise tax stamps, collectors of internal revenue may accept payment of the tax and issue the stamps at a later date", and that the Collector should meanwhile issue a receipt for the tax. Obstacles to the payment of a tax do not, of course, relieve from liability for the tax, nor do they, as was said by this Court in the *Ford Coupe* case with reference to a somewhat similar situation (p. 327), "establish that the intention was not to continue it [the tax] in force."

The fact that the Collector did not advise the respondent of the special excise tax at the time he paid the ordinary occupational tax imposed on a retail liquor dealer by Section 3244 of the Revised Statutes (*infra,* pp. 52–53) is of no materiality. Section 53 of the Act of October 1, 1890 (*infra,* p. 50) specifically provided that special taxes shall become due on the first day of July of each year "or on commencing any trade or business on which such tax is imposed." Section 3232 of the Revised Statutes (*infra,* p. 50) contemplates that a special tax shall be paid before the commencement of the business upon which it is imposed. If, as we submit, the special excise tax had not been repealed, the Government was not, of course, estopped by any failure of the Collector to advise

the respondent that such a tax was due. *Utah* v. *United States*, 284 U. S. 534, 545–546. While the administrative provisions with reference to special taxes (*infra*, pp. 50–52) do not appear to contemplate the making of a demand by the Collector for the tax, the stipulation of facts discloses that a demand was made by the Collector for the special excise tax involved in the instant case about a week before the violation complained of in the information (R. 9).

Undue reliance was placed by the court below upon the administrative rulings to which it referred. Treasury Decision No. 3911, set out at R. 10–11 and referred to in footnote 1 of the opinion below, did, it is true, characterize the special excise tax of $1,000 imposed on anyone carrying on the business of a retail dealer in malt liquors contrary to the laws of a State or Territory as a penalty, and thus not collectible in the summary manner obtaining in the case of taxes, while at the same time it classified as taxes what might be termed the ordinary occupational taxes imposed on retail and wholesale dealers in malt liquors by Section 3244 of the Revised Statutes as amended (*infra*, p. 53). Why it did not refer to the other classes of business mentioned in these statutes is not apparent. In any event, it was approved on July 30, 1926, while Section 35 of Title II of the National Prohibition Act was in effect. As heretofore pointed out, the doubling of the occupational taxes

by Section 35 upon evidence of illegal manufacture and sale contrary to Federal law had converted these taxes into penalties and this Court had so decided in *Lipke* v. *Lederer*, 259 U. S. 557, *supra*, the opinion in which was rendered on June 5, 1922. (See also *Regal Drug Co.* v. *Wardell*, 260 U. S. 386, *supra*, decided December 11, 1922.)

It would appear, therefore, that when the Treasury Department was speaking of the special excise tax imposed under Section 701 as being a penalty it had in mind the change in the nature of the tax which had been effected by Section 35 of Title II of the National Prohibition Act. Of course, by a like token, it should also have referred to the ordinary occupational taxes imposed by Section 3244 of the Revised Statutes as penalties, for such they had become under Section 35 of the National Prohibition Act where there was evidence of illegal manufacture or sale requiring their doubling. A possible explanation of this, however, is that the Treasury Department would not, as a matter of policy, issue a permit to manufacture or sell intoxicating liquor even for purposes permitted by the National Prohibition Act where such activities constituted a violation of State law (see Sections 6 and 9, Title II, National Prohibition Act, 41 Stat. 310, 312), with the result that it was safe to classify the special excise tax under Section 701 as a penalty for all practical purposes even though the carrying on of the particular business might not be violative of Federal law, whereas the ordinary occupational taxes imposed under Section 3244 of the

Revised Statutes would, in many instances, involve business the carrying on of which would not be contrary to either the National Prohibition Act or State laws and for which permits could be issued, such as the manufacture and sale of liquor for medicinal purposes, etc., a consideration which would have made it inadvisable to classify unconditionally these taxes as penalties.

The difficulty, of course, with the Treasury Decision is that it was not sufficiently comprehensive to paint the full picture, but the fact remains that the circular was speaking of the situation as it obtained with respect to these various taxes—inaccurately in part, it is true—when they were considered in the light of Section 35, Title II, of the National Prohibition Act.

The first ruling of the Treasury Department which may be considered as an announcement that Section 701 imposed a penalty which would not continue with the repeal of national prohibition is contained in a Mimeograph issued by the Commissioner of Internal Revenue to the Collectors of Internal Revenue and others concerned on October 4, 1933, about two months before the repeal of the Eighteenth Amendment (Mim. 4077, Treasury Department Cumulative Bulletins Vol. XII–2, p. 500; referred to in footnote 1 of the opinion below). In this Mimeograph the Commissioner listed along with certain taxes on distilled spirits, wines, and fermented liquors "the special taxes imposed upon the several occupations related thereto, which are at present in effect and which will continue if and

when the eighteenth amendment is repealed," but did not include the special excise tax imposed by Section 701.

It is possible that the failure to enumerate this tax as continuing after the repeal of national prohibition was due to a misinterpretation of the decision of this Court in the *La Franca* case, *supra*, decided February 24, 1931, which, however, merely held that the tax imposed by Section 701 was a penalty when doubled under Section 35, Title II, of the National Prohibition Act upon evidence of illegal manufacture and sale under Federal law. But, however that may be, the ruling was, we submit, obviously wrong for the reasons heretofore stated, and this fact was recognized by the Treasury Department less than a year later when the Commissioner of Internal Revenue, in September 1934, issued to the Collectors of Internal Revenue instructions which placed the tax in its right category as a true tax and not a penalty which fell with the repeal of the Eighteenth Amendment (Exhibit C to stipulation of facts, R. 8–9, 11).*

* These instructions were preceded by a special circular, No. 16, dated July 18, 1934, which was issued by the Alcohol Tax Unit of the Bureau of Internal Revenue to District Supervisors and others concerned. This circular, which does not appear in the record, in referring to the procedure to be used by the Alcohol Tax Unit after August 1, 1934, for the determination and assessment of taxes in what were termed violation cases made specific mention of the special excise tax imposed by Section 701 of the Revenue Act of 1926 as a tax to be prorated, beginning with the month in which business is commenced, to the end of the fiscal year. On October 12, 1934, the Commissioner of Internal Revenue issued a Mimeograph (not appearing in the record) to Collectors of

It is evident that not only has there been no settled administrative construction of the statute contrary to the position of the Government but that the latest pronouncement of the Treasury Department is strictly in accord with that position. No administrative interpretation of the statute can, of course, convert into a penalty that which Congress intended to be a tax. Cf. *United States* v. *Morehead*, 243 U. S. 607, 613–614; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493.

Reference is also made by the court below, apparently in connection with the point under discussion, to the Beer Act of March 22, 1933, c. 4, 48 Stat. 16. Just what bearing this Act has on the question presented it is difficult to see. Briefly, this Act, which was passed during national prohibition, defined as nonintoxicating within the meaning of the National Prohibition Act beer, ale, porter, wine, similar fermented malt or vinous liquor, and fruit juices when containing not more than 3.2% of alcohol by weight, imposed a tax on such liquor when containing over ½ of 1% or more of alcohol by volume at the rate of $5.00 per barrel, instead of at $6.00 as formerly (Section 608 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1109), authorized the manufacture of such liquor for sale under permit, and penalized manufacture without permit.

Internal Revenue and others giving detailed instructions with reference to the collection of the special excise tax under Section 701.

Section 4 (a), however, specifically provided that "No permit shall be issued under this section for the manufacture of fermented malt or vinous liquor or fruit juice in any State, Territory, or the District of Columbia, or political subdivision of any State or Territory, if such manufacture is prohibited by the law thereof," and it was also provided in Section 1 (c) that "Nothing in this Act shall be construed as repealing any special tax or administrative provision of the internal revenue laws applicable in respect of any of the following containing one-half of 1 per centum or more of alcohol by volume and not more than 3.2 per centum of alcohol by weight: Beer, ale, porter, wine, similar fermented malt or vinous liquor, or fruit juice." In the stipulation of facts in the instant case it was agreed that the respondent engaged in the business of a retail dealer in malt liquors containing more than ½ of 1% of alcohol and that this constituted a violation of the laws of Alabama and the City of Birmingham (R. 7–8). It is, we think, obvious that the Beer Act has no bearing upon the present litigation.[10]

[10] After the repeal of national prohibition the tax imposed on all beer was fixed at $5.00 a barrel by Section 9 (a) of the Liquor Taxing Act of 1934, c. 1, 48 Stat. 313, 314. The Beer Act was later repealed by Section 202 (a) of the Liquor Law Repeal and Enforcement Act of August 27, 1935 (Pub., No. 347, 74th Cong.). Neither of these Acts has any possible bearing on the question presented.

The court below also found comfort in the fact that Section 701 was not reenacted after the repeal of the Eighteenth Amendment. The reason for this is apparent. As we have heretofore pointed out, the tax imposed by Section 701 was originally in a section containing 12 special occupational taxes. An increasing surplus in the Treasury permitted the reduction of taxes. The section was accordingly amended through reenactment in 1924 so as to include only 9 items and in 1926 all of these taxes were eliminated except the one in question. As Congress evidently desired at the time to retain the tax as a matter of permanent policy, there was, of course, no necessity for further reenactment. But more significant even is the fact that Congress has itself recognized that Section 701 survived the repeal of national prohibition by expressly repealing it in the Revenue Act of 1935 as of July 1, 1935 (see footnote 1, pp. 3–4, *supra*).

A further reason given by the court below for holding that the tax was a penalizing adjunct of the Eighteenth Amendment was that Section 701 required "all kinds of handlers of intoxicating liquors to pay the same amount, instead of, as liquor-taxing acts do, making the exaction fit the business done" (R. 23). Along the same line, the court also said that "Its lumping under one head, and subjecting to one tax all persons engaged in any branch of the liquor business, instead of classifying them and taxing each in accordance with the business he

engages in, as revenue acts commonly do, is highly significant that the act was intended to be, and was a penalty measure" (R. 25). It is obvious that all who handled intoxicating liquor contrary to State laws were in the same boat. There was no logical reason for discrimination between the various kinds of businesses by which the traffic might be engaged in. Nor is it always true that liquor occupational taxes are graded in accordance with the amount of business done. A glance at Section 3244 of the Revised Statutes (*infra*, p. 53), under which occupational taxes have been imposed upon the handlers of intoxicating liquor and the makers of liquor equipment for many years, will show that the general practice is to impose a flat rate regardless of the extent of the business. Thus, a retail dealer in malt liquors pays $20 a year regardless of the extent of his sales.

We have heretofore attempted to show that Section 701 was not enacted as a part of the enforcing machinery of the Eighteenth Amendment and that it was primarily a revenue measure. Of course, the mere fact that it incidentally may have been utilized at one stage of its career to assist in the enforcement of national prohibition, would not change its essential character as a taxing measure. It is too well settled to require argument that a tax does not cease to be a tax merely because Congress may also have had some social or moral object in

view. As was said by this Court in *United States* v. *Yuginovich*, 256 U. S. 450, 462—

> That Congress may under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished, we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue, presents no valid constitutional objection to its enactment. *License Tax Cases*, 5 Wall. 462, 471; *In re Kollock*, 165 U. S. 526, 536; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *United States* v. *Doremus*, 249 U. S. 86. * * *

See also *United States* v. *One Ford Coupe*, 272 U. S. 321, 326, *supra*; *United States* v. *Sullivan*, 274 U. S. 259, 263.

II

SECTION 701 IMPOSES AN EXCISE TAX AND DOES NOT INFRINGE UPON THE RESERVED POWERS OF THE STATES

By its holding that Section 701 needed the support of the Eighteenth Amendment and that it consequently fell with the repeal of that amendment and its citation of the decisions of this Court in the *Child Labor Tax Case* (*Bailey* v. *Drexel Furniture Co.*), 259 U. S. 20, and *Hill* v. *Wallace*, 259 U. S. 44, the court below indicates that it was its view that the tax in some way infringed upon the powers reserved to the States by the Tenth Amendment. This is also the basis of the decision of the Circuit Court of Appeals for the Tenth Circuit in

Kesterson v. *United States,* 76 F. (2d) 913, holding the tax to be a penalty, which case is now pending before this Court on a petition for a writ of certiorari filed by the United States (No. 46, present term).

This question was, we submit, settled contrary to the view of the court below as long ago as 1866 by the decision of this Court in the *License Tax Cases,* 5 Wall. 462. By the Internal Revenue Act of 1864 Congress provided that no persons should be engaged in certain trades or businesses, including those of selling lottery tickets and retail dealing in liquors, until they should have obtained a "license" from the United States. By an amendatory Act of 1866 the words "special tax" were substituted in the place of the word "license" in the former Act. One conducting any business for which a "license" was necessary, or on which the "special tax" was imposed, without having obtained the former or paid the latter, was made liable under the Acts both to the tax and to fine or imprisonment, or both. The Acts provided, however, that no license so granted or special tax so laid should be construed to authorize any business within a State prohibited by the laws thereof, or so as to prevent the taxation by the State of the same business. The general question presented in the cases was whether the defendants in error could be lawfully convicted upon indictments charging them with having engaged in the businesses specified without having paid for the required "license" to carry on the business, or with-

out having paid the special tax, notwithstanding the businesses were wholly prohibited by the laws of the States in which they were conducted.

After holding that it was not concerned with the expediency or inexpediency of such legislation and that questions of policy are for the legislature, the Court addressed itself to the argument of the defendants in error that (p. 470)—

> a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must therefore be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed.

After pointing out that Congress has no power of regulation or any direct control over the internal commerce or domestic trade of the States, that Congress cannot authorize a trade or business within a State in order to tax it, and that "If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution," the Court said (pp. 471–472):

But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.

This construction is warranted by the practice of the government from its organization. As early as 1794 retail dealers in wines or in foreign distilled liquors were required to obtain and pay for licenses, and renew them annually, and penalties were imposed for carrying on the business without compliance with the law. In 1802 these license-taxes and the other excise or internal taxes, which had been imposed under the exigencies of the time, being no longer needed, were abolished. In 1813 revenue from excise was again required, and laws were enacted for the licensing of retail dealers in foreign merchandise, as well as to retail dealers in wines and various descriptions of liquors. These taxes also were abolished after the necessity for them had passed away, in 1817. No claim was ever made that the licenses thus required gave author-

ity to exercise trade or carry on business within a State. They were regarded merely as a convenient mode of imposing taxes on several descriptions of business, and of ascertaining the parties from whom such taxes were to be collected.

With this course of legislation in view, we cannot say that there is anything contrary to the Constitution in these provisions of the recent or existing internal revenue acts relating to licenses.

The Court then said concerning the objection that the dealings for which licenses were required could not be taxed by the National Government because prohibited by State law (pp. 472–473):

Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the National government. There would be great force in it if the licenses were regarded as giving authority, for then there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control of the States.

But, as we have already said, these licenses give no authority. They are mere receipts for taxes. And this would be true had the internal revenue act of 1864, like those of 1794 and 1813, been silent on this head. But it was not silent. It expressly provided, in section sixty-seven, that no license provided for in it should, if granted, be construed to

> authorize any business within any State or Territory prohibited by the laws thereof, or so as to prevent the taxation of the same business by the State. This provision not only recognizes the full control by the States of business carried on within their limits, but extends the same principle, so far as such business licensed by the National government is concerned, to the Territories.
>
> There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

And, finally, in speaking of the effect of the amendatory Act of 1866 in which the term "special tax" was substituted for the word "license", the Court said (pp. 473–474):

> Congress, in framing the act of 1866, has carefully guarded against any misconstruction of the legislative intention by substituting throughout the term "special tax" for the word "license." This judicious legislation has removed all future possibility of the error which has been common among persons engaged in particular branches of business, that they derived from the licenses

they obtained under the internal revenue laws, an authority for carrying on the licensed business independently of State regulation and control. And it throws, moreover, upon the previous legislation all the light of a declaratory enactment. It fully confirms, if confirmation were needed, the view we have already expressed, that the requirement of payment for licenses under former laws was a mere form of special taxation.

The act of 1866 contains the same provision in respect to the effect of special taxes which the original act of 1864 contained in respect to licenses. It provides expressly that the payment of the taxes imposed by it shall not exempt any person carrying on a trade or business from any penalty or punishment provided by State laws for carrying on such trade or business, or authorize the commencement or continuance of any such trade or business contrary to State laws, or prevent the imposition of any duty or any tax on such trade or business by State authority.

That the legislation in this case was framed in the light of the decision of this Court in the *License Tax Cases* would seem apparent. In the Revenue Act of 1866 the imposition was denominated as a "special tax". In Section 701 of the Revenue Act of 1926, it is termed "a special excise tax." Under both Acts a person engaging in any business on which the special tax was imposed without having paid the same was made liable both to the tax and

to fine or imprisonment, or both. Section 701 does not authorize the carrying on of business within a State for the purpose of taxing it. In fact, like the earlier legislation, it specifically provided that payment of the tax should not exempt any person from any penalty or punishment provided for by State law for carrying on the business specified, or authorize the commencement or continuance of any such business contrary to State law. There is consequently, to paraphrase the language of this Court in the *License Tax Cases,* nothing hostile or contradictory in the legislation to that of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. The Federal tax comes into being only after the State has regulated the business by prohibiting it.

The tax imposed by Section 701 is readily distinguishable from those involved in the *Child Labor Tax Case,* 259 U. S. 20, *supra,* and in *Hill* v. *Wallace,* 259 U. S. 44, *supra.* In the *Child Labor Tax Case* the law declared unconstitutional imposed a tax of ten per cent in addition to all other taxes upon the net profits of any person employing children below certain specified ages in mines and factories, or employing in factories children between certain ages more than eight hours a day or more than six days a week. The Act relieved from lia-

bility to the tax anyone who employed a child below the specified age without knowledge of the child's age. It authorized inspection of the employer's factory, not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is, of course, the advancement and protection of the welfare of labor.

This Court held that while "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous" and that "They do not lose their character as taxes because of the incidental motive", the Act in question, when considered in the light of its elaborate specifications indicating the purpose to regulate a matter of State concern and the heavy exaction which it provided for a departure from a detailed and specified course of conduct in business, showed on its very face that it imposed not a tax but a "penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State government under the Federal Constitution."

In *Hill* v. *Wallace, supra,* the Court held that the Future Trading Act was not a valid exercise of the taxing power of Congress because, like the Child Labor Tax Law, it showed on its face that

it was a detailed regulation of a concern or business wholly within the police power of the States, with a heavy exaction to promote the efficacy of such regulation. The Court said that "The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power."

It cannot be said that the provision involved in this case shows on its face any detailed regulation of a matter wholly within the police powers of the States.

On its face the tax is an occupational tax and therefore an excise tax. Occupational taxes on liquor dealers have been levied by the Government almost from its beginning. See *License Tax Cases, supra,* p. 471. The legislative history of the provision in question shows that its primary purpose was the raising of revenue. It may be assumed that an incidental purpose was the aiding of the dry States in their attempt to suppress the liquor traffic within their borders. Indeed, the extent of the exaction was undoubtedly such as effectively to suppress the traffic in some places, at least so far as the smaller dealers were concerned. But this Court has never held that mere onerousness was

sufficient to destroy the validity of an otherwise proper tax. As was said by this Court in *United States* v. *Doremus*, 249 U. S. 86, 93–94, in which this Court held valid the Harrison Narcotic Drug Act by which Congress imposed a special tax on those manufacturing, importing, and dispensing narcotic drugs and undertook to regulate in minute detail the distribution thereof in this country:

> The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. *License Tax Cases*, 5 Wall. 462, 471. Of course Congress may not in the exercise of federal power exert authority wholly reserved to the States. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541, in which case this court sustained a tax on a state bank issue of circulating notes. *McCray* v. *United States*, 195 U. S. 27, where the power was thor-

oughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. And see *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156, and cases cited.

Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. *License Tax Cases*, 5 Wall., *supra*.

The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it. *In re Kollock*, 165 U. S. 526, 536.

The legislation under consideration was before us in a case concerning § 8 of the act, and in the course of the decision we said: "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right." *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402. * * * * * *

See also *Nigro* v. *United States*, 276 U. S. 332, 353–354.

Section 701 was primarily a revenue measure. Discouragement of a traffic forbidden by the States was only incidental. There was not involved any such patent attempt to regulate a matter within

the control of the States as rendered invalid the statutes considered in the *Child Labor Tax Case* and *Hill* v. *Wallace*.

III

THE TAX MEETS THE UNIFORMITY REQUIREMENT OF THE CONSTITUTION

The court below stated that it was impelled to the view that the imposition was a penalty and not a tax because "it is gravely doubtful whether, if the act be construed as imposing an excise tax, it would be valid, since applicable to some States and portions of States and not to others, it is wanting in that geographical uniformity essential to the valid exercise by Congress of such taxing power" (R. 24).

Repeated decisions of this Court disclose that this doubt of the court below is without basis.

It was pointed out in the *Doremus* case, *supra* (p. 93) that:

> The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion.

See also *La Belle Iron Works* v. *United States*, 256 U. S. 377, 392.

Absence of the subject of the tax in particular States or localities or differences in State laws affecting the incidence of the tax do not destroy geographical uniformity. In the *Head Money Cases*, 112 U. S. 580, it was contended that a tax upon the owners of steam or sail vessels of "fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States," was not uniform throughout the United States, but this Court said (p. 594):

> The uniformity here prescribed has reference to the various localities in which the tax is intended to operate. "It shall be uniform throughout the United States." Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it?
>
> The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. * * *

And at page 595 the Court added that "perfect uniformity and perfect equality of taxation, in all the

aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. *State Railroad Tax Cases*, 92 U. S. 575, 612." See also *Knowlton* v. *Moore*, 178 U. S. 41, 106; *United States* v. *Singer*, 15 Wall. 111, 121.

In *Phillips* v. *Commissioner*, 283 U. S. 589, this Court said (p. 602):

> It is contended * * * that the tax liability of the transferee, as thus assessed and collected, violates the constitutional requirement of uniformity because differences in state laws may affect such liability. The extent and incidence of federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity.

See also *Poe* v. *Seaborn*, 282 U. S. 101, 117–118; *Florida* v. *Mellon*, 273 U. S. 12, 17.

In *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, it was contended that the Webb-Kenyon Act, which prohibited the transportation of liquors into dry States for personal use, was invalid because it did not operate uniformly, but this Court held (pp. 326–327):

> So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the States,—so that the question really is a complaint as to the want of uniform exist-

> ence of things to which the act applies and not to an absence of uniformity in the act itself. * * *.

If it be suggested that the tax is invalid because liability thereto is dependent upon State law and that there thus results an improper delegation of the Federal taxing power to the State legislatures, the answer is apparent not only from the quotation given from the decision of this Court in *Phillips v. Commissioner* (*supra*, p. 47) but also from the following quotation from this Court's opinion in the *Clark Distilling Co.* case (p. 326):

> The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. * * *

CONCLUSION

For the reasons stated, we respectfully submit that Section 701 of the Revenue Act of 1926 did not fall with the repeal of the Eighteenth Amendment; that it imposes an excise tax and does not infringe upon the reserved powers of the States; and that it meets the constitutional requirement of uniformity. The judgment of the Circuit Court of

Appeals should therefore be reversed and the judgment of the District Court affirmed.

STANLEY REED,
Solicitor General.
JOSEPH B. KEENAN,
Assistant Attorney General.
JAMES E. RUFFIN,
MAHLON D. KIEFER,
Special Assistants to the Attorney General.
W. MARVIN SMITH,
Attorney.

OCTOBER 1935.

APPENDIX

Statutory provisions relating to special taxes:

Revised Statutes, Section 3232 (U. S. C., Title 26, Sec. 181):

> No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided.

Revised Statutes, Section 3233 (U. S. C., Title 26, Sec. 182):

> Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on. In case of a firm or company, the names of the several persons constituting the same, and their places of residence, shall be so registered.

Section 53, Act of October 1, 1890, c. 1244, 26 Stat. 567, 624 (U. S. C., Title 26, Sec. 186):

> That all special taxes shall become due on the first day of July, eighteen hundred and ninety-one, and on the first day of July in each year thereafter, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from

the first day of the month in which the liability to a special tax commenced to the first day of July following. * * * it shall be the duty of special tax payers to render their returns to the deputy collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive such returns, duly signed and verified, not later than the last day of the month, except in cases of sickness or absence as provided for in section three thousand one hundred and seventy-six of the Revised Statutes.

Revised Statutes, Section 3238 as amended (U. S. C., Title 26, Sec. 187):

All special taxes imposed by law, including the tax on stills or worms, shall be paid by stamps denoting the tax, and the Commissioner of Internal Revenue is required to procure appropriate stamps for the payment of such taxes; and the provisions of sections thirty-three hundred and twelve and thirty-four hundred and forty-six, and all other provisions of law relating to the preparation and issue of stamps for distilled spirits, fermented liquors, tobacco, and cigars, shall, so far as applicable, extend to and include such stamps for special taxes; and the Commissioner of Internal Revenue shall have authority to make all needful regulations relative thereto.

Revised Statutes, Section 3239 as amended (U. S. C., Title 26, Sec. 188):

Every person engaged in any business, avocation, or employment, who is thereby made liable to a special tax, except tobacco peddlers, shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special

tax; and any person who shall, through negligence, fail to so place and keep said stamps, shall be liable to a penalty equal to the special tax for which his business rendered him liable, and the costs of prosecution; but in no case shall said penalty be less than ten dollars. And where the failure to comply with the foregoing provision of law shall be through willful neglect or refusal, then the penalty shall be double the amount above prescribed: *Provided,* That nothing in this section shall in any way affect the liability of any person for exercising or carrying on any trade, business, or profession, or doing any act for the exercising, carrying on, or doing of which a special tax is imposed by law, without the payment thereof.

Revised Statutes, Section 3240 as amended (U. S. C., Title 26, Sec. 189):

Each collector of Internal revenue shall, under regulations of the Commissioner of Internal Revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality he shall furnish a certified copy thereof, as a public record, for which a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested may be charged.

Special taxes on brewers, distillers, etc., other than those imposed by Section 701 of the Revenue Act of 1926:

Revised Statutes, Section 3244, as amended (U. S. C., Title 26, Secs. 202, 203, 205):

Special taxes are imposed as follows:

First. Brewers shall pay one hundred dollars * * *.

Second. Manufacturers of stills shall each pay fifty dollars, and twenty dollars for each still or worm for distilling made by him. * * *

* * * * *

Fourth. Retail dealers in liquors shall pay twenty-five dollars. * * *

Wholesale liquor-dealers shall pay one hundred dollars. * * *

Fifth. Retail dealers in malt liquors shall pay twenty dollars. * * *

Wholesale dealers in malt liquors shall pay fifty dollars. * * *

Revised Statutes, Section 3281 as amended (U. S. C., Title 26, Sec. 193, 306):

That any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than one hundred dollars nor more than five thousand dollars and imprisoned not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property

found in the distillery or rectifying establishment, or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises; and all the right, title, and interest of such person in the lot or tract of land on which such distiller is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or enclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery which shall be found in any such building, yard, or enclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Revised Statutes, Section 3243 (U. S. C., Title 26, Sec. 201):

The payment of any tax imposed by the internal-revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILED

Supreme Court of the United States

OCTOBER TERM, 1936

No. 40

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM S. [illegible],
Birmingham, Alabama,
[illegible],
Montgomery, Alabama,
Attorneys for Appellee

HILL, HILL, WHITING, THOMAS & REES,
Montgomery, Alabama,
GEORGE D. TOOLE,
[illegible],
JAMES W. ALLRED,
TYLER H. [illegible],
DAVID P. [illegible],
[illegible],
Of Counsel for Appellee

INDEX

	Page
Statement	3
Prior Decisions on Questions here Presented	4
Summary of the Argument	5
Argument:	6-24
Reply to Petitioner's Point I	6
Reply to Petitioner's Point II	15
Reply to Petitioner's Point III	18
Summary	21
Conclusion	23
Certificate of Counsel as to Service	24

AUTHORITIES CITED

Federal Statutes:

Section 701 of the Revenue Act of 1926, c. 27, 44. Stat. 95. (USCA, Title 26, Sec. 206) 3-13

Section 12, Title 26, USCA, the Internal Revenue Code 22

Section 202, Title 26, USCA, the Inter Revenue Code 10

Section 203, Title 26, USCA, the Internal Revenue Code 10

Section 204, Title 26, USCA, the Internal Revenue Code

Section 205, Title 26, USCA, the Internal Revenue Code 5-9-10-12-16-22

Section 206, Title 26, USCA, the Internal Revenue Code 5-9-11-12-13-22

Article I, Section 8, Constitution of United States 19-21

Page

10th Amendment to Constitution of United States ____ 15-16
18th Amendment to Constitution of United States ____ 14-15-18
National Prohibition Act, c. 85, Se. 1; 41 Stat. 305, Title 27, USCA, 1 ____ 7-13-15
Revenue Act of 1935 ____ 9
War Time Prohibition Act, c. 212; 40 Stat. 1046 ____ 7

State Statutes:

Alabama Prohibition Act, ch. 167, Code of Alabama, 1923 ____ 7

Regulations:

Number 3911, Treasury Department Regulations ____ 8-21

Table of Cases:

Bailey vs. Drexel Furniture Co., 259 U. S. 20; 42 S. Ct. 449; 66 L. Ed. 618 ____ 3-10-11-15-17
Brabham vs. Cooper, 9 Fed. Sup. 904 ____ 4
Cleveland vs. Davis, 9 F. Sup. 337 ____
Constantine vs. U. S., 75 Fed. (2nd) 928 ____ 5-18
Green vs. Page, 9 Fed. Sup. 844 ____ 4
Green vs. U. S., (9CCA) 67 Fed. (2nd) 846 ____ 15
Hammer vs. Dagenhart, 247 U. S. 251; 38 S. Ct. 529 ____ 16
Helvering vs. U. S., 188 U. S. 605, 613; 23 S. Ct. 427; 47 L. Ed. 614 ____ 11-13
Hill vs. Wallace, 259 U. S. 44; 42 S. Ct. 453; 66 L. Ed. 822 ____ 10
Kansas vs. Colorado, 206 U. S. 46; 27 S. Ct. 655 ____ 16
Kesterson vs. U. S., 76 Fed. (2nd) 913 ____ 5
Knickerbocker Ice Co. vs. Stewart, 253 U. S. 149; 40 S. Ct. 438 ____ 19
Liberis vs. Nee, 10 Fed. Sup. 336 ____ 4
Lipke vs. Lederer, 259 U. S. 557, 561-2; 42 S. Ct. 549; 66 L. Ed. 1061 ____ 11-12-14

Page

McCaughn, Collector, vs. Hershey Chocolate Co., 283 U. S. 488, 492; 51 S. Ct. 510, 512 ____ 8
Massey vs. U. S., 191 U. S. 608; 54 S. Ct. 532; 78 L. Ed. 1019; 89 A. L. R. 1510 ____ 15
O'Sullivan vs. Felix, 233 U. S. 318, 324; 34 S. Ct. 596; 58 L. Ed. 980 ____ 12
Panama Refining Co. vs. Ryan ____ U. S. ____; 79 L. Ed. 223 (advance sheet) 55 S. Ct. 241 ____ 20
Regal Drug Corp. vs. Wardell, 260 U. S. 386; 43 S. Ct. 152; 67 L. Ed. 318 ____ 14
United States vs. Chambers, 291 U. S. 217; 78 L. Ed. 653 ____ 15
United States vs. Kesterson, 8 Fed. Sup. 820 ____ 5
United States vs. LaFranca, 282 U. S. 568; 51 S. Ct. 278 ____ 14
John M. Wilkerson vs. Charles Rahrer, 287 U. S. 77; 53 S. Ct. 42 ____ 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 40

THE UNITED STATES OF AMERICA, PETITIONER

v.

GUS L. CONSTANTINE, ALIAS DR. GUS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEE

STATEMENT.

The question here presented is the validity of Section 701 of the Revenue Act of 1926, c. 27, 44 Stat. 95, (USCA, Title 26, Section 206) on December 3rd, 1934. On this date the Court overruled, (R. 5) Appellee's demurrers, (R. 2), and motion to strike (R. 6) the information filed against him on November 21, 1934, (R. 1), for the violation of said statute.

The cause was submitted on an agreed statement of facts, (R. 7). The Court overruled Defendant's motion to find him not guilty, (R. 15); granted, over defendant's objection, Petitioner's motion to find him guilty, (R. 15); convicted Appellee and passed sentence upon him, (R. 16).

PRIOR DECISIONS ON QUESTION HERE PRESENTED.

On December 17, 1934 the District Court for the Southern District of Alabama, Ervin, District Judge, held the levy in question to be a "penalty" and not an "excise tax."—*Cleveland vs. Davis,* 9 F. Sup. 337.

On January 8th, 1935 the District Court for the Southern District of Georgia, in a well-reasoned opinion by Barrett, District Judge, held that the statute here under consideration levied a "penalty" and not an "excise tax" and fell with the adoption of the 21st Amendment to the Constitution.—*Green vs. Page,* 9 F. Sup. 844.

On February 25th, 1935 the District Court for the Eastern District of South Carolina, Meyers, District Judge, held the levy in question to be a "penalty" and not a "tax", but was of the opinion that the section in question did not fall with the repeal of the 18th Amendment.—*Brabham vs. Cooper,* 9 F. Sup. 904.

On March 13th, 1935, the District Court for the Northern District of Florida, Long, District Judge, held the levy in question to be a "penalty" and not an "excise tax."—*Liberis vs. Nee,* 10 F. Sup. 336.

On March 15th, 1935 the instant case was decided in the United States Circuit Court of Appeals for the Fifth Circuit, in which the court held that the levy in question was a "penalty" and not an "excise tax". This holding standing alone, it is respectfully submitted, entitled the defendant to an acquittal on the information,

pleadings filed, and the agreed statement of facts in this case. However, the Circuit Court of Appeals in said opinion held further that the statute fell with the repeal of the 18th Amendment.—*Constantine vs. United States*, 75 Fed. (2nd) 928.

On April 8th, 1935 the Circuit Court of Appeals for the Tenth Circuit, on an appeal from the District Court for the Northern District of Oklahoma, Kennamer, District Judge, (*U. S. vs. Kesterson*, 8 Fed. Sup. 820) reversed the District Court, and held that the levy in question was a "penalty" and not an "excise tax," and further held that the statute fell with the ratification of the 21st Amendment.—*Kesterson vs. United States*, 76 Fed. (2nd) 913.

SUMMARY OF ARGUMENT

Section 205, Title 26 (USCA), the Internal Revenue Code, prescribes the excise tax to be paid by wholesale and retail dealers in distilled spirits, wines, and malt liquors for the year here in question. It is conceded that this tax was paid by the Appellee. Section 206 levies a penalty in aid of the enforcement of state and municipal prohibition statutes and/or ordinances. Being a penalty it fell on the 5th day of December, 1933, with the ratification of the 21st Amendment. In any event the Appellee's demurrers, and/or motion to strike and/or motion for acquittal on the agreed statement of facts, should have been granted. The decree of the Circuit Court of Appeals, setting aside the conviction and dismissing the cause should be affirmed.

ARGUMENT.

We do not feel that were we to concede the soundness of each of the three propositions argued by Petitioner in its brief, that such a concession would warrant a reversal of this case. In our humble opinion, this case does not hinge alone on either or all of Appellant's three asserted propositions; as is apparent from a careful reading of the opinion of the court below, as well as other decisions on the identical point, heretofore cited in this brief.

However, we are unable to concede the soundness of any of Appellant's three asserted propositions. We shall discuss each, in the order in which they appear in adversary's brief.

REPLY TO PETITIONER'S POINT I.

The Petitioner states in his brief (11) that the Court below held that the statute here under consideration imposed a "penalty as part of the enforcing machinery of the 18th Amendment". Appellee does contend that the exaction levied was a penalty, and not a tax and that it fell with the repeal of the 18th Amendment. This irrespective of whether it formed any part of the enforcing machinery of the amendment or not.

Adversary counsel in his argument doubtless sets up a correct chronology of the origin of the statute insofar as the facts are affirmatively set out therein. However, Counsel overlooked and totally failed to mention certain facts deemed by us to be highly pertinent, some of which were given con-

sideration by the court below, as is apparent from its opinion. While it is true that the instant statute first became a law as part of the revenue Act of 1918, which was approved on February 24, 1919; it is likewise true that the resolution proposing the 18th Amendment was passed by the 65th Congress. It was proposed to the legislatures of the several states on December 19th, 1917. This amendment was declared in a proclamation by the Acting Secretary of State, on the 29th day of January, 1919 to have been ratified by the Legislatures of ¾ of the whole number of states in the Union, and was accordingly effective. The Court below noted that the War Time Prohibition Act, 40 Stat. 1046, was adopted as a law on the 21st day of November, 1918, c 212, 40 Stat. 1046. It was superseded by the National Prohibition Act on the 28th day of October, 1919, c. 85, Sec. 1, 41 Stat. 305; Title 27, USCA. 1. Many of the states, and communities of the nation had passed prohibition laws or ordinances prior to any of the dates herein mentioned. Alabama passed such a state prohibition law during the year 1915, and it has remained effective to the present day, *Chapter 167, Code of Ala. 1923.*

Petitioner in its brief quotes freely from various issues of the Congressional Record as to dates, and the purpose of the enactment of the statute. We note that he fails, however, to quote from any of the volumes evidencing what might be termed, "The Prohibition Mania" which seized our Congress and many of our people at or about the time in question. We will not weight this brief down, by setting forth the

many virtues, and highly beneficial results which Prohibition, it was believed, would inevitably effectuate, as stated in the Congressional Record at this time, by sound members of the National Congress. It is believed that this court still is able to picture the state of the public mind on the prohibition question at that time, and to be impressed with the fact that the instant statute, as evidenced by its recent repeal, is but one of the many statutes passed under the influence of the Prohibition movement which undoubtedly reached its zenith during the year in which the statute here under consideration was enacted into law.

The Court below in reaching its conclusion, excepted to by adversary counsel, gave consideration to the administrative interpretation placed upon the section by the Treasury Department.

It is axiomatic that a Treasury Department regulation interpreting a Revenue statute is accepted, by the Courts unless there is a cogent and persuasive reason for rejecting it.—*McCaugh, Collector vs. Hershey Chocolate Co.*, 283 U. S. 488, 492; 51 S. Ct. 510, 512.

At page 10 of the transcript of the record appears Treasury Department Regulation 3911 approved and published by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury as of July 30, 1926, in which he specifically points out that the statute here under consideration levies a penalty and not a tax. The Commissioner of Internal Revenue in this regulation correctly points out that the levy provided by Sec-

tion 205 of Title 26, levies a tax which is to be treated and collected as such. While the levy under Section 206 of the said Title, while denominated a "special tax" is in truth and in fact a penalty and is to be collected only as penalties are collectible. It will be noted that this regulation was published thirty days after the statute became effective, the same having been adopted on February 26th, 1926, to become effective by its terms "on and after July 1, 1926." It will further be noted, that while the original statute was passed in 1919, that no stamp was ever printed, or shown in any government catalogue of stamps until September 13th, 1934. (R. 8). The Collector of Internal Revenue for Alabama had no such stamp on, or prior to the date of Appellee's arrest in this case. (R. 8) The said Collector in his written demand upon appellee, and other beer dealers, for the payment of internal revenue taxes for the year here in question made no demand for the payment of the $1,000.00, exacted by said Section. (R. 9).

The Court below was properly impressed by the fact that after the adoption of the Act of March 22, 1933, 40 Stat. 18, authorizing the manufacture and sale of beer, that the Congress failed to reenact the Statute though it had been carried forward in many prior revenue acts. It will be further noted that the section has never been reenacted since the repeal of the 18th Amendment. On the contrary, what could not be said by the Court below in its opinion, but which can be said now, Congress did specifically repeal the statute here under considera-

tion in the Revenue Act of 1935, effective on the 1st day of July, 1935. This failure to reenact the statute, and its repeal at or about the date this case reached this Court, make it clear that Congress deemed the purpose and function of the Act, as being to penalize and prohibit. Since the exaction levied was a penalty and not a tax, the statute fell with the repeal of the 18th Amendment.—*Bailey vs. Drexel Furniture Co.*, 259 U. S. 20; 42 S. Ct. 449; 66 L. Ed. 618; *Hill vs. Wallace*, 259 U. S. 44; 42 S. Ct. 453; 66 L. Ed. 822.

Section 205 clearly lays an "excise tax" within the true intendment and meaning of these words as many times defined by this Court, for the sale, at wholesale and retail, of spirits, wines and malt liquors. It will be noted that the tax is graduated, according to whether such person is a wholesale dealer or a retail dealer, and it is again graduated according to the type of liquor sold. That is to say, a tax in one amount is levied for the sale of malt liquor. Another amount, for the sale of distilled spirits. One amount being for a wholesale dealer, another amount for a retail dealer.

Section 202 levies an excise tax in different amounts with reference to the amount of beer manufactured by a brewer.

Section 203 lays a true excise tax on the manufacture of stills: "Manufacturers of stills shall each pay $50.00, and $20.00 for each still or worm for distilling made by him."

Compare the exaction levied by Section 206 in the flat sum of $1,000.00 irrespective of the volume

or type of business carried on. Irrespective of whether the person be a brewer, a distiller, a manufacturer of stills, a wholesale or retail dealer in distilled spirits or malt liquors. Compare this exaction to the true excise tax laid by Sections 202, 203, 204, and 205 of the said Title of the Act, for carrying on exactly the same business. The comparison cannot be made except the conclusion be reached that Section 206 levies no "excise tax" within the true intendment and meaning of that term, but on the contrary levies a penalty for the violation of the laws of, "any State, Territory or District of the United States, contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law." *Sect. 206*

The application of the section hinges on the violation of a law. The commission of a crime. This fact strongly indicates that its purpose was penal rather than that of raising revenue for the support of the government.

In the case of *Lipke vs. Lederer*, this Court, speaking through Mr. Justice McReynolds clearly and definitely laid down a sound rule for determining the difference between a tax and a penalty when it used the following language:

> The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid, Bailey vs. Drexel Furniture Co., 250 U. S. 20; 42 S. Ct. 449; 66 L. Ed. 817. (May 15, 1922). When by its very nature the imposition is a penalty, it must be so regarded Helwig vs. United States,

188 U. S. 605, 613; 23 S. Ct. 427; 47 L. Ed. 614. Evidence of crime (section 29) is essential to assessment under section 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty.

O'Sullivan vs. Felix, 233 U. S. 318, 324; 34 S. Ct. 596; 58 L. Ed. 980. *Lipke vs. Lederer*, 259 U. S. 557, 561, 562; 42 S. Ct. 549; 66 L. Ed. 1061.

The exaction made by Section 206 for the sale of malt liquor is $1,000.00 per year. Compare this to the true excise tax in the amount of $20.00 levied for the sale of the same liquor under Section 205. It will be noted that the levy where the sale of malt liquor is illegally made, is fifty times the true excise tax levied when the sale is lawfully made. This great difference is strong evidence that the imposition based upon illegality was intended as a penalty and not as a tax. The Court should take judicial knowledge of the fact that the average small retail beer dealer could not pay in addition to all other licenses, taxes and costs of operating his business the sum exacted by said section, and stay in business. The statute is therefore not only penal in its nature, but prohibitory in effect. This Court in the case of *Helvering vs. United States*, 188 U. S. 605, cited in *Lipke vs. Lederer, supra*, said at page 613:

> Although the sum imposed by reason of undervaluation may be simply described as "a further sum" or "an additional duty", if it is yet so enormously in excess of the greatest amount of

> regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the action of the importer, such facts clearly show it is a penalty in its intrinsic nature, and the failure of the statute to designate it as a penalty, but describing it as "a further sum" or "an additional duty", will not work a statutory alteration of the nature of the imposition, and it will be regarded as a penalty when by its very nature it is a penalty. It is impossible, judging simply from its language, to hold this provision to be other than penal in its nature.

It will be noted that on February 24th, 1931, while Section 35 of the National Prohibition Act, doubling certain taxes, was in effect, this Court held the exaction levied by the section here under consideration to be a penalty and not a tax. Adversary counsel seems to take consolation in the fact that the levy was there doubled. We fail to see, however, how this latter fact in any way affects the fundamental status of the $1,000.00 exaction, levied by the statute. It is our opinion that the language used by this Court in the case referred to is decisive of the issue here presented when it held:

> By section 701, par. 9 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 (U. S. C. title 26, Sec. 206 (26 USCA Sec. 206 note) it is provided that every person carrying on the business of retail liquor dealer, etc. in any state, etc., contrary to the laws of such state, etc. or in any place where the carrying on of such business is prohibited by local or municipal law, shall pay in addition to all other taxes, $1,000. This section was passed in lieu of a similar provision in the Revenue Act of 1918 (sec-

tion 1001, 40 Stat. 1128) repeated in the Revenue Act of 1921, (Sec. 1001, 42 Stat. 296). The government, accordingly, treats the item sought to be recovered under section 701 as having been imposed by an act in force prior to the National Prohibition Act. With that view we agree.

Of the four items involved, two unmistakably are penalties, and are so denominated. The other two, notwithstanding they are called taxes, are in their nature also penalties.

A "tax" is an enforced contribution to provide for the support of government; a "penalty" as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by *Lipke vs. Lederer*, 259 U. S. 557, 561-562; 42 S. Ct. 549; 66 L. Ed. 1061. See also *Regal Drug Corp. v. Wardell*, 260 U. S. 386; 43 S. Ct. 152; 67 L. Ed. 318.

U. S. vs. LaFranca, ~~*supra*,~~ 282 U. S. 568; 51 S. Ct. 278, 280.

With the repeal of the Eighteenth Amendment the Federal Government lost its right to penalize the sale of malt liquors within the several states. This is essentially true for that no power was left in Congress after the repeal of the Eighteenth Amendment to legislate on the subject except for the purpose of taxation. This Court and many other courts have recently held, "that the effect of the repeal of the Eighteenth Amendment,

without a saving clause, was to repeal the statute creating the offense charged in the indictment."

The repeal of the Eighteenth Amendment by the Twenty-first Amendment deprived Congress of the power to enact or continue in force legislation on the subject of liquor prohibition insofar as such power was derived solely from the Eighteenth Amendment (National Prohibition Act, (27 USCA); Const. Amend. 18 and 21). *Green vs. U. S.* (9 CCA) 67 Fed. (2nd) 846; *U. S. vs. Chambers,* 291 U. S. 217; 78 L. Ed. 653; *Massey vs. U. S.,* 191 U. S. 532; 78 L. Ed. 1019; 89 A. L. R. 1510.

REPLY TO PETITIONER'S POINT II.

Appellant in the Second Proposition urges that this cause be reversed, for that, the section in question, "imposes an excise tax and does not infringe upon the reserved powers of the States". We are unable to concur in this conclusion. We deny that the court below rested its decision on this basis. However, we do believe that the levy if it be held to be a tax, does infringe upon the reserved powers of the States.

The purpose of this statute, as is clearly apparent upon its face, is to enable the Federal Government to regulate or prohibit intrastate dealing in liquor, which is purely a function of the State authority since the repeal of the Eighteenth Amendment. The statute violates the provisions of the tenth amendment of the Constitution of the United States, for that Congress under the guise of a tax, seeks to regulate or prohibit intrastate dealings in malt liquor. *10 Amendment Constitution of United States; Bailey vs. Drexel Furniture Company, Supra;*

Hammer vs. Dagenhart, 247 U. S. 251; 38 Sup. Ct. Rep. 529; *Kansas vs. Colorado,* 206 U. S. 46, 27 S. Ct. 655.

Since the repeal of the Eighteenth Amendment the regulation of the business of dealing in malt liquor is a matter wholly within the police power of the several states. Who can read the instant statute and reach any conclusion other than that it levies a heavy exaction on this business for the purpose of regulating or prohibiting the same? We need only turn to the provisions of the preceding code section, namely, Section 205, Title 26, USCA to find there a uniform tax laid for the purpose of producing revenue, which the Appellant here, under the undisputed evidence, paid. This is the tax laid by the sovereign against all of its citizens throughout the several states for the privilege of doing or engaging in this particular business. The fact that the amount of the levy here under consideration is disproportionate and is in addition to the levy laid by Section 205, makes its purpose at once apparent.

Grant the validity of this law, all that Congress would need to do thereafter in seeking to take over control of any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment to our Constitution, would be to enact a detailed measure of complete regulation of the subject and enforce it by so-called taxes laid upon departures from it. It was not the intention of the framers of our Constitution or its citizens since its adoption, to give such magic to the word "tax", as would break down all constitutional limitations under the powers of Congress

and completely wipe out the sovereignty of the several states.

The language used by this court, Mr. Justice Taft, speaking in the case of *Bailey vs. Drexel Furniture Company* (Child Labor Tax case), *supra*, supports the contention of the invalidity of the statute. For this reason we take the liberty of quoting the following excerpts from the opinion in the Bailey case, which impress us as being of particular application here:

> Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more.
>
> In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?
>
> It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not instructed to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty, even though it requires us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insiduous feature because it leads citi-

zens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions.

REPLY TO PETITIONER'S POINT III.

Appellants in their Third Proposition Brief (45) urge the reversal of this cause for that, "The tax meets the uniformity requirements of the Constitution." While the Circuit Court did not reverse the District Court on this ground standing alone, it is true that it did state in its opinion in effect that; "The additional consideration, that it is gravely doubtful whether, if the act be construed as imposing an excise tax, it would be valid, since applicable to some states and portions of states and not to others, it is wanting in that geographical uniformity essential to the valid exercise by Congress of such taxing power, further impels to the view that the imposition of the act is not a tax but a penalty." (citing authorities). *Constantine, Supra, page 930.*

The point is here taken that if the said section be held to levy a true tax, it is an unwarranted delegation

by the Congress of the United States of its power to lay taxes, to the several states, municipalities and local communities of the United States, and accordingly does violence to Article I Section 8 of our Federal Constitution.

The people of our nation granted only to the Congress of the United States, through Article I Section 8 of our Federal Constitution, the power to lay and collect taxes, to pay debts, and provide for the common defense and general welfare of our country. If the exaction here under consideration be held to be a tax, it could be laid or repealed not only at the instance of any of the several states, or the several municipalities, but at the whim of any local community in the United States. The support of the vital functions of government cannot be made to depend upon the whim of the trustees of a local county township. Such was not the intention of the framers of our constitution or of our people in adopting it as the basic law of the land.

Our Supreme Court has many times held that the subject, taxation, was entrusted to Congress, to be dealt with according to its discretion, not for delegation to others. Such an authorization would inevitably destroy the harmony and uniformity which the constitution not only contemplated, but actually established. It would defeat the very purpose of the grant. Congress cannot transfer its legislative power to the states. By nature this is non-delegable. The foregoing is practically the language of Mr. Justice McReynolds speaking for this Court in the case of: *Knickerbocker Ice Co. vs. Stewart,* 253 U. S. 149; 40 S. Ct. 438.

Mr. Justice Fuller speaking for this Court in the case of *John M. Wilkerson vs. Charles Rahrer*, 287 U. S. 77; 53 S. Ct. 42, 49, squarely supports this point using the following language:

> Nor can Congress transfer legislative powers to a state, nor sanction a state law in violation of the constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. *Cooley v. Board of Wardens*, 52 U. S. 12 How. 299 (13; 996); *Gunn vs. Barry*, 82 U. S. 15 Wall 610, 623 (21; 212, 215); *United States v. Dewitt*, 76 U. S. 9 Wall 41 (19; 593).
>
> It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a state.

In the very recent case of *Panama Refining Company vs. Ryan*, ... U. S. .....; 79 L. Ed. 223 (Advance Sheets) 55 S. Ct. 241, 248, this Court held, speaking through Mr. Justice Hughes:

> The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.

While it is true that unequal application of a tax due to conditions peculiar to various states is not of itself a lack of constitutional uniformity, and that the state statutes cannot be used to spell out a lack of uniformity, it is likewise true that the peculiar condition of specific states may not be chosen as the very basis for the imposition of the tax.

Here it is plain that the alleged tax was levied without any thought of uniformity. The sole purpose of the tax being to lay it only in states or local communities where the sale of malt liquors is prohibited by local regulations. In short, the sole purpose of the levy is to aid in the enforcement of a local police regulation. The Congressional intent and purpose in the enactment of the statute here under consideration, from the language used therein, is plain and is clearly violative of Section 8, Article 1 of our Federal Constitution.

SUMMARY

The gravamen of this suit is laid in the information, (R. 1). The charge is that Appellee, "did then and there unlawfully carry on the business of a retail dealer in malt liquor, without first having paid the special excise tax of $1,000.00; that at the time and place aforesaid, the laws of the State of Alabama prohibited the carrying on of the business of a retail dealer in malt liquor, and the carrying on of such business was contrary to the laws of the State of Alabama." It is at once apparent that the violation of a state statute is the basis for the imposition of the exaction here under consideration.

Treasury Department Regulations number 3911, approved and published as of July 30, 1926, (R. 10) declared the exaction to be a penalty and not a tax. This Regulation clearly and correctly points out the difference between an excise tax and a penalty. If differentiates between the exaction levied by Section

205, which it correctly denominates as an excise tax, and the exaction levied by Section 206, which it correctly denominates as a penalty. The Appellee had in his possession as of the date of the information and as of the date of the trial in the District Court, the circular published by the Collector of Internal Revenue for the District of Alabama, (R. 9) which had been delivered to him by said Collector, and addressed, "to all beer and liquor dealers", advising him as to the tax that he would be required to pay for the year here in question, namely, July 1, 1934 to June 30, 1935. No mention is made in this circular of the $1,000.00, the failure to pay which led to the filing of the information, the basis of this suit, on November 21, 1934; charging the failure to pay the said exaction on October 8, 1934 (R. 1).

Appellee registered with the Collector of Internal Revenue and paid all taxes as mentioned in the circular, to the United States as therein required, (R. 11).

Harwell G. Davis, Collector of Internal Revenue for the District of Alabama, did not have in his possession or under his control the $1,000.00 liquor stamp until November 27, 1934. No such stamps were shown to be in existence in any catalogue of stamps issued by the United States prior to the 13th day of September, 1934. These facts were stipulated, (R. 8). Accordingly the said alleged excise tax could not have been paid by this defendant as of the date alleged in said information without violating the provisions of Section 12, Title 26, USCA. It is

axiomatic that no citizen must violate one statute in order to prevent his violating another statute. This essentially is true where the statutes in question form part and parcel of the Regulations pertinent to a single subject, under a single title of our Federal Code. The government's fiscal year here in question began July 1, 1934. It is accordingly apparent that if the exaction was a true excise tax, it should have been paid as of that date, and the required stamp issued therefor. The amount of the exaction levied compared to the true tax levied for engaging in the same business is sufficient, standing alone, to make the Congressional intendment of penalizing and prohibiting, rather than the raising of revenue, for the support of the government, at once apparent.

CONCLUSION.

We feel that the most convincing conclusion possible is simply again to invite the Court's attention to the exceptionally well-reasoned opinion rendered in this cause by the Court below. We feel that the facts stated by the Court below in reaching its decision when considered by this court will impel the same conclusion, namely, that the exaction levied by the statute is a penalty, rather than a true tax. Being penal in its nature, it fell with the repeal of the 18th Amendment to the Constitution. That should the exaction be construed to be a tax rather than a penalty, it would be wanting in that geographic uniformity essential to the valid exercise by Congress of its taxing powers. A statute must always be construed, if reasonably possible, so as to avoid not

only the conclusion that it is unconstitutional, but also grave doubts upon that score. That for these, and other reasons heretofore shown in this brief and as set forth in the opinion of the Court below, the decree appealed from should be affirmed.

Respectfully submitted,

WILLIAM S. PRITCHARD,
Attorney for Appellee.

CERTIFICATE OF COUNSEL AS TO SERVICE.

I, the undersigned, of counsel for Appellee in this cause, hereby certify that I have on this the 16th day of October, 1935, served three copies of the foregoing Brief and Argument on Hon. Stanley Reed, Solicitor General, have mailed single copies to Mr. Joseph B. Keenan, Assistant Attorney General, Messrs. James E. Ruffin and Mahlon D. Kiefer, whose names appear as Special Assistants to the Attorney General on the brief in this cause, at Washington, D. C., and to Mr. Jim C. Smith, United States Attorney, at Birmingham, Alabama.

WILLIAM S. PRITCHARD,
Attorney for Appellee.

Dissent
p. 1, 2, 3

SUPREME COURT OF THE UNITED STATES.

No. 40.—October Term, 1935.

The United States of America, Petitioner, *vs.* Gus L. Constantine.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 9, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

In November, 1934, an information was filed in the District Court for Northern Alabama charging that on October 8, 1934 at Birmingham, Alabama, the respondent conducted the business of a retail dealer in malt liquor contrary to the laws of the State, without having paid the special excise tax of $1,000 imposed by section 701 of the Revenue Act of 1926.[1] A demurrer and a motion to quash were overruled, a plea of not guilty was entered and a jury trial was waived. Pursuant to a stipulation of facts, the court found that for the fiscal year July 1, 1934, to June 30, 1935, the respondent registered with the Collector of Internal Revenue as a retail liquor dealer and paid the tax of $25.00 imposed upon such dealers by R. S. 3244, as amended;[2] on the date named in the

[1] "On and after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by section 701 of the Revenue Act of 1924, a special excise tax of $1,000, *in the case of every* person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

"Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both." Revenue Act of 1926, c. 27, 44 Stat. 9, 95.

[2] U. S. C. Tit. 26, Section 205. The act imposes special taxes as follows: Brewers $100; manufacturers of stills $50, and $20 for each still or worm;

§1394

information the respondent had a restaurant in Birmingham, where he conducted the business of a retail dealer in malt liquors containing more than one-half of one percent alcohol, which business was contrary to the laws of the state and of the city; and had not paid the $1,000 tax. Respondent's motion for judgment was denied, that of the United States was granted, and the respondent was sentenced. The Circuit Court of Appeals reversed the judgment[3] on the ground that the section became inoperative upon the repeal of the Eighteenth Amendment.

In its petition for certiorari the United States, though admitting the absence of a conflicting decision by the Circuit Court of Appeals of any other circuit, called attention to diverse decisions in the district courts,[4] to the many other cases pending in which action is awaiting authoritative settlement of the question presented herein, to the large amount of money involved, and to the number of persons whose liability will remain uncertain until the dispute is finally settled. The question thus assumes the importance required by Rule 38 and the writ issued accordingly.

In concluding that the law imposed a penalty in aid of the enforcement of the Eighteenth Amendment, and therefore fell with its repeal, the court relied upon the legislative history and administrative interpretation of section 701, and also thought such a construction necessary to avoid a serious question under Article I, Section 8 of the Constitution as to the uniformity of operation of the act throughout the United States. The Government insists that the section was not a part of the machinery for enforcing the prohibition amendment, but a revenue measure levying an excise conformably to the Constitution.

First: The Government attacks, and the respondent supports, the conclusion of the court below that the section was adopted pursuant to the Eighteenth Amendment. We think little aid is to be had from the legislative history. On the one hand it is said that the substance of the section was originally embodied in the Reve-

---

retail dealers in liquors, $25; wholesale liquor-dealers $100; retail dealers in malt liquors $20; wholesale dealers in malt liquors $50.

[3] 75 F. (2d) 928.

[4] *Cleveland* v. *Davis*, 9 F. Supp. 337; *Green* v. *Page*, 9 F. Supp. 844; *Brabham* v. *Cooper*, 9 F. Supp. 904; *Liberis* v. *Nee*, 10 F. Supp. 336; *Senate Club* v. *Viley* (D. C. Idaho); *United States* v. *Arthover* (D. C. N. D. Tex.); *United States* v. *Columbia Fruit Products Co.* (D. C. E. D. Pa.). The last three decisions are unreported.

nue Act of 1918 which became a law February 28, 1919; that while under consideration by Congress in the autumn of 1918 the bill contained the section in question; and that, when enacted, it was made effective as of January 1, 1919. As the Eighteenth Amendment was not proclaimed until January 9, 1919, effective January 9, 1920, the argument is that the Act of 1918 was independent revenue legislation and no section of it could have been intended to enforce fundamental law which was to become operative long after the passage of the act. From the fact that the provision for the additional tax of $1,000 was carried forward from the Act of 1918 through those of 1921 and 1924 into that of 1926[5] the conclusion is drawn that the tax remained, as it was in the beginning, a means of raising revenue, and that its purpose was not altered by the existence of national prohibition when it was readopted as section 701 of the Revenue Act of 1926. Reference is also made to the fact that the section was specifically repealed by the Revenue Act of 1935[6] and the deduction is drawn that Congress thought it had no relation to the prohibition amendment.

On the other hand, the respondent urges that the proclamation of the Amendment prior to the passage of the Act of 1918 made prohibition a certainty; that the tax of $1,000 laid upon violators of state liquor laws, in addition to the graded excises on various forms of the liquor business prescribed by R. S. 3244, and the retention of the $1,000 tax in the 1926 act, which discarded the many existing excises on other businesses, evince a purpose to prohibit rather than to tax liquor traffic violative of state laws.

For reasons presently to be stated we find it unnecessary to decide whether the policy exhibited by the act at its inception was independent of the Eighteenth Amendment or in subvention of it.

Second: The court below and the respondent regard the administrative construction as persuasive that the section is penal in character. After the adoption of the Revenue Act of 1926 the Treasury ruled that the so-called tax of $1,000 was a penalty.[7]

[5] R. A. 1918, c. 18, Sec. 1001 (13), Sec. 1005, 40 Stat. 1057, 1138, 1139; R. A. 1921, c. 136, Secs. 1001, 1004, 42 Stat. 227, 296, 298; R. A. 1924, c. 234, Secs. 701, 704, 43 Stat. 253, 327, 328.

[6] Act of August 30, 1935 (Pub. No. 407, 74th Cong.).

[7] T. D. 3911 (July 30, 1926). "Subject of internal revenue and prohibition taxes are (*sic*) divided into two classes:

1. Internal revenue taxes proper—that is taxes generally recognized as such.

Upon repeal of the Eighteenth Amendment the position was reversed; collectors were instructed to treat the item as a special tax; and the Department proceeded to prepare and distribute appropriate revenue stamps to be issued in token of its payment. We think the administrative practice has little bearing upon the question of the nature of the exaction. During the life of the Amendment collection was lawful whether the demand was for a tax or a penalty; and the classification by the administrative officers was therefore immaterial. Congress then had power, in the enforcement of prohibition, to impose penalties for violations of national prohibitory laws.[8]

Third: The repeal of the Eighteenth Amendment renders it necessary to determine whether the exaction is in fact a tax or a penalty. If it was laid to raise revenue its validity is beyond question notwithstanding the fact that the conduct of the business taxed was in violation of law. The United States has the power to levy excises upon occupations,[9] and to classify them for this purpose; and need look only to the fact of the exercise of the occupation or calling taxed, regardless of whether such exercise is permitted or prohibited by the laws of the United States[10] or by those of a State.[11] The burden of the tax may be imposed alike on the just and the unjust. It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from pay-

---

2. Those while in the nature of internal revenue taxes are necessarily held to be penalties, 'and must be collected through the United States Courts.'

The following list is classed as taxes:

Retail dealers in malt liquors	$20.00
Wholesale dealers in malt liquors	50.00

The following list is classed as penalties:

'Under section 701 of the Revenue Act of 1926. A special tax of $1,000 on any person carrying on retail business of dealer in malt liquors contrary to laws of state or territory.'

'Those designated as penalties. Such taxes will be carefully scheduled, summarized, and reported to the United States Attorney for any action he may bring.' "

[8]Section 2 of the Eighteenth Amendment directed that the Congress and the several States should have concurrent power of enforcement by appropriate legislation. Compare *National Prohibition Cases*, 253 U. S. 350; *United States* v. *Lanza*, 260 U. S. 377; *Hebert* v. *Louisiana*, 272 U. S. 312.

[9]*License Tax Cases*, 5 Wall. 462.

[10]*United States* v. *Yuginovich*, 256 U. S. 450, 462; *United States* v. *Stafoff*, 260 U. S. 477, 480; *United States* v. *One Ford Coupe*, 272 U. S. 321, 327, 328.

[11]*License Tax Cases*, *supra*.

ment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise. The tax imposed by R. S. 3244[12] affords an apposite illustration. That act imposes an excise, varying in amount, upon different forms of the liquor traffic. The respondent paid the annual tax of $25 thereby required, despite the fact that he was violating local law in prosecuting his business. Undoubtedly this was a true tax for which he was liable. The question is whether the exaction of $1,000 in addition, by reason solely of his violation of state law, is a tax or a penalty? If, as the court below thought, section 701 was part of the enforcing machinery under the Amendment, it automatically fell at the moment of repeal.[13]

But even though the statute was not adopted to penalize violations of the amendment, it ceased to be enforceable at the date of repeal, if, in fact, its purpose is to punish rather than to tax. The only color for the assertion of Congressional power to ordain a penalty for violation of State liquor laws is the Eighteenth Amendment, which gave to the federal government power to enforce nation-wide prohibition.[14] That has been recalled; and the case must be decided in the light of Constitutional principles which would have been applicable had the Amendment never been adopted. In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax, and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it,[15] and we must ascribe to it the character disclosed by its purpose and operation, regardless of name.[16] Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of State law, and as such beyond the limits of federal power.

Since 1878, the revised statutes have classified various forms of the liquor traffic for the payment of excises differing in amount according to the nature of the business.[17] When the section exacting $1,000 additional from all persons engaged in the traffic in violation of State law was made a part of the revenue laws

[12] *Supra*, Note 2.
[13] *United States* v. *Chambers*, 291 U. S. 217.
[14] See Note 8, *supra*.
[15] *United States* v. *LaFrance*, *supra*, 572.
[16] *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625; *United States* v. *One Ford Coupe*, *supra*, 328; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387.
[17] See Note 2, *supra*.

the amount of the tax due by the respondent under R. S. 3244 was $25.00. The so-called excise of $1,000 is forty times as great. It is ten times as great as the annual tax under R. S. 3244 for wholesale liquor dealers and brewers, and fifty times as great as that imposed upon dealers in malt liquors. If the imposts under R. S. 3244 were fixed in amount in accordance with the importance of the business or supposed ability to pay, the exaction in question is highly exorbitant. This fact points in the direction of a penalty rather than a tax.

The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue.[18] Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct.[19]

We conclude that the indicia which the section exhibits of an intent to prohibit and to punish violations of State law as such are too strong to be disregarded, remove all semblance of a revenue act and stamp the sum it exacts as a penalty. In this view the statute is a clear invasion of the police power, inherent in the States, reserved from the grant of powers to the federal government by the Constitution.

We think the suggestion has never been made—certainly never entertained by this Court—that the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of State concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for viola-

[18] Compare *Lipke* v. *Lederer*, 259 U. S. 557, 562.
[19] *Helwig* v. *United States*, 188 U. S. 605, 613.

tions of the State's laws inheres in the body of its citizens speaking through their representatives. So far as the reservations of the Tenth Amendment were qualified by the adoption of the Eighteenth the qualification has been abolished.

Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a State law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State.[20]

In view of what has been said we do not consider the contention that the law is bad for want of the uniformity of operation required by Article I, Section 8, of the Constitution.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[20] *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44; *Linder* v. *United States*, 268 U. S. 5, 17.

SUPREME COURT OF THE UNITED STATES.

No. 40.—October Term, 1935.

The United States of America, Petitioner, *vs.* Gus L. Constantine.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 9, 1935.]

Mr. Justice Cardozo.

I think the judgment should be reversed.

Congress may reasonably have believed that, in view of the attendant risks, a business carried on illegally and furtively is likely to yield larger profits than one transacted openly by law-abiding men. Not repression, but payment commensurate with the gains is thus the animating motive. The gains in all likelihood will seldom be exhausted by a tax of $1,000. Congress may also have believed that the furtive character of the business would increase the difficulty and expense of the process of tax collection. The Treasury should have reimbursement for this drain on its resources. Apart from either of these beliefs, Congress may have held the view that an excise should be so distributed as to work a minimum of hardship; that an illegal and furtive business, irrespective of the wrongdoing of its proprietor, is a breeder of crimes and a refuge of criminals; and that in any wisely ordered polity, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful.

Thus viewed, the statute was not adopted to supplement or sanction the police powers of the states or of their political subdivisions. It was adopted, for anything disclosed upon its face or otherwise, as an appropriate instrument of the fiscal policy of the nation. The business of trading in things contraband is not the same as the business of trading in legitimate articles of commerce. Classification by Congress according to the nature of the calling affected by a tax (*State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527) does not cease to be permissible because the line

of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state. Power is not abused because the shock of its impact is equitably distributed. The practice of medicine by an unlicensed charlatan may be taxed on a different basis from its practice by a licensed physician, irrespective of the fact that the charlatan is guilty of a crime. The practice of law by a disbarred lawyer may be taxed on a different basis from the practice of the same profession by a lawyer in good standing. With as much if not greater reason a like distinction may be drawn between the licensed and the unlicensed traffic in intoxicating liquors. The underlying principle in all these cases is as clear as it is just. A business that is a nuisance (*People* v. *Vandewater*, 250 N. Y. 83), like any other business that is socially undesirable, may be taxed at a higher rate than one legitimate and useful. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 100. By classifying in such a mode Congress is not punishing for a crime against another government. It is not punishing at all. It is laying an excise upon a business conducted in a particular way with notice to the taxpayer that if he embarks upon that business he will be subjected to a special burden. What he pays, if he chooses to go on, is a tax and not a penalty. *Nigro* v. *United States*, 276 U. S. 332, 353, 354. *Cf. Life & Casualty Insurance Co.* v. *McCray*, 291 U. S. 566, 574.

The judgment of the court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful. *Fletcher* v. *Peck*, 6 Cranch 87, 130; *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44. There is another wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion. *Ogden* v. *Saunders*, 12 Wheat. 213, 270. The warning sounded by this court in the *Sinking Fund Cases*, 99 U. S. 700, 718, has lost none

of its significance. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." I cannot rid myself of the conviction that in the imputation to the lawmakers of a purpose not professed, this salutary rule of caution is now forgotten or neglected after all the many protestations of its cogency and virtue.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.